No. 20770

In the

United States Court of Appeals

For the Ninth Circuit

UNITED SHOPPERS EXCHANGE, a California corporation; MANTELL, INC., a California corporation,

Appellants,

vs.

GENERAL ELECTRIC COMPANY, a New York corporation; BORG-WARNER CORPORATION, an Illinois corporation; CALIFORNIA ELECTRIC SUPPLY COMPANY, a California corporation; RADIO CORPORATION OF AMERICA, a Delaware corporation; WHIRLPOOL CORPORATION, a Delaware corporation; MAYTAG COMPANY, a Delaware corporation, MAYTAG WEST COAST COMPANY, a California corporation; GENERAL MOTORS CORPORATION, a Delaware corporation; FRIGIDAIRE SALES CORPORATION, a Delaware corporation, NORGE SALES CORPORATION, an Indiana corporation,

Appellees,

and

BROADWAY-HALE STORES, INC., a California corporation,

Defendant.

Brief for Appellees General Motors Corporation and Frigidaire Sales Corporation

On Appeal from the United States District Court for the Northern District of California

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No. 20770

In the

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UNITED SHOPPERS EXCLUSIVE, a California corporation; MANFREE, INC., a California corporation,

Appellants,

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OPINION OF TRIAL COURT

The memorandum opinion and order of the United States District Court granting the motions of all appellees for directed verdicts and for dismissal of the complaints appear in the Clerk's

Transcript of Record at R. 1912-1976.[1] The memorandum opinion has also been reprinted in *United Shoppers Exclusive v. Broadway-Hale Stores, Inc., et al.,* 1966 Trade Cas. 82,265 (N.D. Calif. 1965).

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the United States District Court for the Northern District of California, dated November 24, 1965, dismissing two consolidated actions (R. 1977). The judgment appealed from was entered upon the order of the court granting the motions of all defendants, including General Motors Corporation (hereinafter referred to as "General Motors") and Frigidaire Sales Corporation (hereinafter referred to as "Frigidaire"), for directed verdicts and for dismissal of the complaints made at the conclusion of plaintiffs' evidence on the issue of liability (R. 1912-1976).

Jurisdiction of the District Court was invoked by plaintiffs pursuant to the provisions of 15 U.S.C. §§ 15 and 26 on account of alleged violations of the Sherman Act, 15 U.S.C. §§ 1 and 2. This Court has jurisdiction of the appeal, but only as an appeal from the final judgment, pursuant to 28 U.S.C. § 1291.

Upon appellants' motion, and subsequent to the docketing of this appeal, this Court dismissed Broadway-Hale Stores, Inc., as an appellee.

STATEMENT OF THE CASE

This appeal is essentially a simple one, complicated only because appellants created a voluminous record in the trial court. The appeal follows an unsuccessful attempt by appellants to weave the fabric of an imagined conspiratorial boycott out of a mass of unrelated documents and unfavorable testimony. Appellants sought to establish the theory that appellees had acted in concert to deprive appellant Manfree, Inc. of television sets and major household appliances during the period from 1957 to 1964.

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1. We have adopted throughout this brief the same references used by appellants. Thus, references to the Clerk's Transcript of Record will be "R.", and the transcript of the trial proceedings "Tr." Transcripts of the pretrial hearings are referred to as "P. Tr."

Throughout the pretrial proceedings and the trial, appellants struggled unsuccessfully to find some reasonable explanation as to *why* the appellees would have chosen to conspire to boycott Manfree. Appellants advanced the suggestion that there had been a conspiracy to maintain suggested retail prices and to require retailers in the San Francisco area to tag, advertise and sell at those suggested prices. However, the facts showed that some appellees and alleged co-conspirators did not even have suggested retail prices, and that in instances where wholesalers furnished such suggested prices to their retailers, the prices were largely ignored in tagging, advertising and selling. Indeed, as we shall demonstrate, appellee Frigidaire abandoned the promulgation of suggested prices in 1960 for the very reason that retailers had paid no attention to such prices. Appellants also put forward the argument that appellees conspired to refuse to sell to "discount houses" in the San Francisco area. Again the facts were to the contrary and failed even to disclose similarity of action. The merchandise of a number of appellees was carried by concerns in the San Francisco area which characterized themselves as "discount houses," and many, if not all, other San Francisco retailers who carried appellees' merchandise advertised and sold at "discounts." Appellants additionally argued that there was a conspiracy to favor Broadway-Hale and four other retailers in the San Francisco area, and that this somehow had the effect of excluding appellants. Again, the facts were at odds with appellants' argument. There turned out to be no significant pattern at all to the dealings (if any) between appellees and the five retailers, and no connection between such dealings and any decisions by appellees as to whether or not to sell to Manfree. As we shall demonstrate, appellee Frigidaire terminated its franchise arrangements with Broadway-Hale and two of the other retailers during the same time period in which it decided not to franchise Manfree.

Ultimately, appellants produced no evidence of any conspiracy to boycott appellants or to do anything. The trial witnesses emphatically denied the existence of any agreement or conspiracy.

In instances where appellees declined to sell to appellant Manfree, the evidence showed affirmatively that they had good business reasons, and in fact made their decisions unilaterally without communicating with one another and without any knowledge of each others' plans or intentions. There was no circumstantial evidence of conspiracy, nor even any evidence of "parallelism." On the contrary, the only pattern of conduct disclosed by the evidence was one of disparateness.

A. The Significant Facts.

Appellant United Shoppers Exclusive ("U.S.E.") is a self-styled "discount" department store which, during the period 1957 to 1964, was located on Alemany Boulevard in San Francisco. U.S.E. generally did not itself engage in the purchase or sale of merchandise; rather it leased different areas of the store to concessionaires who conducted various types of retail business. One such lessee-concessionaire was appellant Manfree, Inc. ("Manfree"), which was in the business of selling television sets and major household appliances.

The appellees comprise six manufacturers of household appliances or television sets and three wholesale distributors of such merchandise.[2]

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2. Among the manufacturer appellees, General Electric manufactures both appliances and television sets, RCA manufactures only television sets, and Maytag, Whirlpool, Borg-Warner and General Motors manufacture only appliances. The wholesale distributor appellees are Maytag West Coast which distributes Maytag appliances, California Electric Supply, which up until 1963 distributed Philco appliances and television sets and Frigidaire Sales Corporation which distributes Frigidaire appliances manufactured by General Motors. Norge Sales, another appellee dismissed on summary judgment, distributed Norge appliances through local independent distributors. A defendant at the trial, Broadway-Hale, was a retail seller of appliances, television and other merchandise. Broadway-Hale was dismissed by appellants during the pendency of this appeal. In addition, at the commencement of these cases, appellants named as defendants a number of other companies engaged in the manufacture or wholesale distribution of appliances or television, as well as certain retailers of such merchandise; all these other defendants were dismissed prior to trial.

1. CONTACTS BETWEEN APPELLANTS AND APPELLEES.

Appellants had little, if any, contact with most of the appellees. The six manufacturer appellees (with the exception of General Electric as to its "General Electric" brand merchandise) sold only to wholesale distributors rather than to retailers. As for the distributor appellees, Frigidaire was first asked for a dealer franchise by appellant Manfree shortly before appellants filed suit, and Maytag West Coast and California Electric Supply each dealt with Manfree for awhile and then—at different times and for different reasons—elected to cease selling to Manfree.[3] For a time Manfree carried the Norge and Hotpoint lines of appliances which it purchased from independent local distributors (Tr. 2378; 3053; 3068). In addition, Manfree carried a variety of other major appliance and television lines not manufactured or distributed by any of the appellees[4] (Tr. 5640-5642; 5713-5715).

In those instances in which a particular appellee was in a position to sell to Manfree but elected not to do so (or decided to discontinue selling), that appellee had its own independent business reasons for not selling. The principal reason expressed by several witnesses at the trial was that Manfree simply did not appear to be capable of doing a good job selling appliances and television, had inadequate display space and untrained and inept personnel (Tr. 3270-3271; 4191-4194; 5639-5640). One distributor whose appliance line had been carried by Manfree considered that the Manfree sales people were not aware of the selling points of the line and exhibited no interest in learning (Tr. 3376-3378). Another distributor took exception to the misleading "bait and switch" advertising that appellants used back in 1957-1959, advertising brands of appliances and television

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3. Maytag West Coast commenced selling to Manfree in January of 1958 (Pl. Ex. No. 1523); its franchise with Manfree expired of its own terms in March of 1959 (Maytag Ex. No. 13143; Tr. 3375). California Electric Supply sold the Philco line to Manfree from approximately May 10, 1957 to September 12, 1958 (Tr. 3936-3938).

4. The predecessor concessionaire of Manfree also had carried many appliance and television lines, including several manufactured or distributed by appellees (Tr. 5711-5712).

that Manfree had no intention of selling to customers (Tr. 2867-2869). At least one distributor considered it undesirable that U.S.E. was a "closed door" store which was closed to the general public and restricted solely to members of certain trade groups[5] who had purchased a membership card for $2.00 (Tr. 4320).[6] Another distributor complained about the drinking habits of the Manfree employee in charge of the major appliance section of the store (Tr. 3376-3379).[7] In short, there was a variety of reasons why Manfree did not represent a particularly attractive dealer outlet and why certain of the distributors could and did reach unilateral business decisions not to sell to Manfree.

Manfree, of course, purported to sell at "discount prices" but this was not a significant factor to any of the appellee distributors in deciding not to sell to Manfree. Many, if not all, sellers of appliances and television sets in San Francisco sold at "discounts" (*e.g.*, Tr. 1536; 3288; 3333; 4085-4092; 5029; 5646) and indeed other self-styled "discount stores" in San Francisco were able to secure major brand merchandise.[8]

2. CONTACTS BETWEEN APPELLANTS AND GENERAL MOTORS AND FRIGIDAIRE.

Appellee General Motors Corporation manufactures Frigidaire appliances. However, it does not sell them to retailers; this function is performed by appellee Frigidaire Sales Corporation, a

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5. That is, Government employees, veterans and members of labor unions (Tr. 5707-5708; 6201-6202).

6. Over a year *after* filing suit U.S.E. abandoned its "closed door" policy (Pl. Ex. No. 497).

7. One of Manfree's officers who testified at trial, Mr. Boyd, acknowledged that Manfree had received complaints about the employee (Tr. 5655-5656). Manfree management at first shrugged off the complaints (Tr. 3378). The employee later was terminated for showing up drunk on the job (Tr. 5656).

8. Thus the concessionaire at GET, another so-called "discount store," handled many of the lines involved in this case, including Norge (Tr. 2895), Hotpoint (Tr. 6073-6074; 3185-3186) and Westinghouse (Tr. 6169). GET never expressed an interest in carrying the Frigidaire line (Tr. 4042-4043; 4049-4050).

wholly owned subsidiary of General Motors. The only contact between appellants and General Motors was that in July, 1960, shortly before filing suit, appellants sent a letter to General Motors asserting that they wished to purchase Frigidaire appliances (Pl. Ex. No. 492; Tr. 4080-4085). The letter was promptly forwarded to the Frigidaire Sales Corporation office in the Bay Area (Tr. 4228-4229; Pl. Ex. No. 493-494).

Until receipt of the July, 1960 letter, Frigidaire had been unaware that Manfree had any desire to sell Frigidaire appliances.[9] A few days after receipt of the letter, the Frigidaire sales representative covering the San Francisco territory visited U.S.E. and concluded that the Manfree appliance department was small, unattractive and had no particular appeal as a potential Frigidaire dealership (Tr. 4317-4321). Frigidaire decided not to franchise Manfree at that time (Tr. 4039-4041).

Appellants filed suit a couple of weeks later (Tr. 4222-4223). The filing of the suit, of course, made Frigidaire even less enthusiastic about taking Manfree on as a dealer[10] (Tr. 4084-4085).

The Frigidaire witnesses testified that their decision not to franchise Manfree was made independently without any agreement or any discussion with any other distributor or manufacturer or any retailer (Tr. 4283; 4321). There was no evidence from

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9. Prior to 1960, Frigidaire had only two contacts with appellants, both of a routine nature, when the Frigidaire sales personnel were conducting a survey of appliance outlets (Pl. Ex. No. 487). There was no evidence that any request to purchase Frigidaire merchandise was made by appellants at those times (Tr. 4083; 4222; 4281; 4309). Appellants misstate at page 49 of their Opening Brief that "representatives of appellee Frigidaire had visited Manfree in 1957 and were asked for a franchise," citing the testimony of Bernard Freeman, an officer of Manfree, at Tr. 5825-5829. But Freeman testified that he had no recollection of any conversation with the Frigidaire salesman in 1957 or at a later date other than simply being introduced to him (Tr. 5825). It perhaps is typical of appellants' use of the record in this case that they would characterize a personal introduction as—instead—a request for a franchise.

10. The record shows only one further contact between appellants and General Motors and Frigidaire. Appellants directed a second round of letters to General Motors and Frigidaire in September of 1961—after the litigation was well underway—asking to purchase merchandise (Tr. 4235-4240; Pl. Ex. Nos. 496-497; 4270).

any other witness or in any document that Frigidaire in fact did discuss the question of franchising Manfree with anyone else or that Frigidaire was even aware of the decisions made by any other distributors with respect to selling (or not selling) to Manfree (Tr. 4284).

Frigidaire was highly selective in choosing its dealers (Tr. 4072; 4318-4319). During the period involved in these suits, Frigidaire moved to reduce the number of dealers it had in San Francisco in the hope of obtaining a stronger, more loyal dealer organization and in this connection terminated, prior to 1960, the franchises of Broadway-Hale, Macy's and Lachman Bros. (Tr. 4073-4078)—who, of course, were three of the five San Francisco retailers who appellants claim were part of the alleged conspiracy to boycott appellants.

3. PRACTICES FOLLOWED WITH RESPECT TO PRICING AND ADVERTISING.

For a good many years it has been common in many fields of commerce for the manufacturers or distributors of consumer goods to disseminate to their retail dealers "suggested list prices." These may or may not be used as a guideline by the retailer in selling to the consumer. Likewise, there has been the frequent custom in consumer goods fields for manufacturers or distributors to give advertising allowances to retail dealers.

In the present case there was voluminous evidence regarding the giving of advertising allowances and the dissemination of suggested list prices in the television and appliance fields. The practices followed by appellees varied substantially from time to time and from appellee to appellee. (*E.g.,* compare Tr. 5066 with Tr. 3985-3986.)

Some (but not all) of the appellee manufacturers furnished lists of suggested retail prices to their wholesale distributors. In some instances distributors in turn passed these suggested price lists on to their dealers; in other instances distributors constructed their *own* lists of suggested retail prices and furnished them to dealers (*e.g.,* Tr. 857; 1725; 2828-2831; 3474-3475; 5173). None of the manufacturer appellees issuing list prices concerned them-

selves with whether their distributors had forwarded the lists to retailers (*e.g.*, Tr. 3475; 4542) or whether retailers followed these prices (*e.g.*, Tr. 5174). Some manufacturers or distributors—including Frigidaire from 1960 on and General Electric (as to Hotpoint) from 1958 on—chose not to suggest any retail prices[11] (Tr. 3278; 4208-4209).

In those instances where suggested retail price lists were furnished, retailers ignored these guidelines frequently and with impunity (Tr. 647-650; 1178; 1184; 1526-1527; 1606-1608; 2226-2230; 5646; 5648-5649).[12] Indeed, the retailers, including Broadway-Hale, engaged in frequent advertising, tagging and selling of appliances and television sets below suggested list prices (Tr. 901; 1431-1433; 1450; 1515-1516; 2352-2353; 3289; 4085-4086). One of appellants' own officers characterized Broadway-Hale as one of the "biggest discounters" in San Francisco (Tr. 5646).

In one form or another all distributors offered advertising allowances to their dealers but here again the practices varied from time to time and from distributor to distributor. Contrary to the assertion at pp. 32-39 of Appellants' Opening Brief, there was no uniform practice of granting advertising allowances only where the retail advertising followed suggested list prices. For example, appellees Maytag West Coast and General Electric were shown to have given advertising allowances to dealers in numerous instances for below-list advertising (Tr. 3383-3403; 1431-1432; 1996-2000; 4398). In the case of Frigidaire, the type of price advertising done by a dealer had no bearing whatsoever on whether Frigidaire would give him an advertising allowance (Tr. 1315-1317; 4085-4092; 751).[13] And commencing in 1960 with its 1961 models, Frigidaire ceased disseminating suggested retail list prices, prin-

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11. Another manufacturer of appliances, Westinghouse, dropped the practice of publishing suggested list prices in 1960 or 1961 (Tr. 6165).

12. The retailers' practices varied from one retailer to another (Tr. 4086) and from one line of merchandise to another (Tr. 1892-1893; 1980). Of course, as we shall demonstrate below, the circumstance that a retailer may have elected to follow suggested retail prices, without more, does not rise to a level of proscribed activity.

13. In their effort to argue to the contrary, appellants point to evidence that has nothing to do with the matter at hand. At pp. 34-35 of their

cipally for the reason that such suggested list prices as Frigidaire had previously promulgated were largely ignored (Tr. 4085-4092). Of course, as before, Frigidaire continued to extend advertising allowances to its dealers (Tr. 4088).

4. DEALINGS BETWEEN APPELLEES AND THE FIVE ALLEGED RETAIL CO-CONSPIRATORS.

Appellants claim that five retailers (Broadway-Hale, Macy's, Redlick-Newman, Lachman Bros. and Sterling Furniture Company) were members of the alleged conspiracy to boycott appellants. Broadway-Hale and the other four retailers were among the best known and most successful San Francisco retailers of television sets and household appliances.[14] At various times all five retailers carried lines of merchandise manufactured or distributed by one or another of the appellees; likewise the retailers on occasion received advertising allowances from some of the appellees.

Beyond these generalities the dealings between appellees and the five retailers—to the extent there were any dealings at all—resemble a crazy-quilt. Thus Frigidaire at various times dealt with all five of the retailers.[15] However, Frigidaire cut off both Broad-

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Opening Brief, appellants quote from a Frigidaire advertising manual dating back prior to the period involved in the suit (Pl. Ex. No. 338). The portion quoted from pp. 1 and 2 of the old manual simply sets forth a formula for calculating advertising allowances to dealers based on their purchases from Frigidaire—irrespective of the actual prices at which the dealers advertised or sold their products. The portion quoted by appellants from p. 6 of the manual does deal with the use of suggested prices in advertising but clearly on its face this relates only to advertising run nationally or locally *by Frigidaire itself* listing the names of its local dealers, and has nothing to do with advertising run by dealers themselves.

14. Each had large, attractive stores, were well established in the business, had branch stores in surrounding communities (Tr. 147; 1534; 1797; 2446-2447; 6360-6361), and sold substantial quantities of appliances. However, during the period involved in these suits, Sterling Furniture closed all its stores except one located outside of San Francisco (Tr. 119), which was acquired in 1963 by Macy's (Tr. 2446-2447). Broadway-Hale drastically curtailed its retail operations (Tr. 28; 1527) and went out of the appliance business in San Francisco in 1963 (Tr. 1527).

15. It should be noted that a large percentage of Frigidaire's sales in San Francisco were to dealers other than Broadway-Hale and the alleged co-conspirators (Pl. Ex. No. 160 B).

way-Hale[16] and Macy's as dealers in 1959 (prior to the time that appellant Manfree asked Frigidaire for a franchise) and never took them back on, cancelled Lachman Bros. in 1958 and refranchised the latter at the end of 1960 (Tr. 4074-4079) and lost Sterling as a San Francisco dealer in 1961 when that company closed its last remaining San Francisco store (Tr. 4077; see also Frigidaire Ex. No. 14003).

Such dealings as there were between other appellees and the five retailers were similarly of a sporadic nature. As an example, Redlick's was the only one of the retailers who was a Frigidaire dealer during the entire period in these suits. However, during that period appellee Maytag West Coast sold to Redlick's only in the years 1958 and 1959 (Pl. Ex. No. 641). Redlick's never did purchase appliances or television sets from alleged co-conspirator Westinghouse[17] (Tr. 6165). Redlick's handled the General Electric line for awhile, but its General Electric dealership was cancelled in 1959; Redlick's never obtained a franchise for the Hotpoint line (Tr. 2263-2264).

During such times as they were franchised dealers for particular lines of television sets or household appliances, the five retailers did obtain various types of advertising allowances from the distributors of those lines. There was a great diversity in the advertising programs of one distributor as compared with those of another distributor. In the case of Frigidaire, its advertising allowances were available to its dealers on a nondiscriminatory basis (Tr. 751; 3984-3988; 4088-4092).

5. AHLMA, NEMA, EIA AND THE SAN FRANCISCO BETTER BUSINESS BUREAU.

There were no contacts or communications—direct or indirect—between the distributor appellees (or between the manufac-

16. Frigidaire terminated its franchise with Broadway-Hale on account of a dispute over Frigidaire's one-year warranty provision for its appliances. Broadway-Hale was unwilling to honor the warranty for more than a 90-day period (Tr. 4074-4075; 4241; Frigidaire Ex. No. 14004).

17. That is, throughout the period from 1957 through 1963.

turer appellees) with respect to dealings with Manfree or U.S.E. or any other matters of concern in these actions. In an effort to obscure this fatal defect in their claim of conspiracy, appellants introduced evidence relating to various associations, such as the American Home Laundry Manufacturers Association (AHLMA), the National Electrical Manufacturers Association (NEMA), the Electronic Industries Association (EIA) and the San Francisco Better Business Bureau on the theory that membership in such organizations had sinister implications.

Some of the manufacturing appellees belonged to NEMA or AHLMA or EIA. Frigidaire belonged to NEMA and AHLMA but not EIA (Pl. Ex. for Id. No. 3011). The five alleged retail co-conspirators belonged to the San Francisco Better Business Bureau.[18] Neither Frigidaire nor General Motors was a member or attended any meetings of the BBB (Tr. 1754).

The evidence introduced or offered[19] as to NEMA and AHLMA showed that the activities and meetings of those organizations concerned nothing except such matters as product specifications (*e.g.,* Pl. Ex. for Id. No. 3007), a rather general code for ethical and nonmisleading advertising (Pl. Ex. No. 2) and reports on industry sales (*e.g.,* Pl. Ex. for Id. Nos. 2099, 3000-3005).[20] Sim-

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18. Appellant U.S.E. itself was a member of the Better Business Bureau for a period of time (Tr. 6054), as of course were literally hundreds of other local retailers.

19. Some of the voluminous evidence offered by appellants regarding NEMA, AHLMA, EIA and the San Francisco Better Business Bureau was rejected by the trial court as hearsay, cumulative or irrelevant. See part V(A)(4) of this brief, *infra.* Nevertheless, throughout their Opening Brief, in discussing the alleged "facts," appellants refer to this and other excluded evidence without distinguishing between that which was admitted and that which was excluded.

20. Appellants attach as Appendix B to their brief a letter over the rubber-stamped name of Judson Sayre, president of Norge Sales Corporation (Pl. Ex. for Id. No. 431). The letter has attached to it a memorandum by an unidentified author. The "Sayre" letter states that the memorandum was passed out at a NEMA meeting. Appellants several times assert, with gross inaccuracy, that this memorandum is evidence that appellees were working together to enforce retail price policies (see Appellants' Opening Brief, pp. 72-73, 82, 141-142). There was no evidence that Judson Sayre in fact wrote or sent the letter, no evidence as to who had written the memo-

ilarly, the evidence as to the San Francisco Better Business Bureau showed nothing more than that many retailers were members and that at one time there were meetings—in cooperation with a representative of the State of California—to consider the promulgation of a code of advertising standards (Tr. 1576; 2317-2322).[21]

6. DEALINGS BETWEEN APPELLANTS AND THE SAN FRANCISCO NEWSPAPERS.

For a period of time the two morning newspapers then published in San Francisco—the San Francisco Examiner and the San Francisco Chronicle—declined to accept advertising from U.S.E.[22] The San Francisco Examiner had the policy of not carrying advertising of "closed door stores," such as U.S.E., where the general public was excluded, and where persons responding to the advertising thus might go out to the store and not be permitted to buy the advertised merchandise (Tr. 2094). The San Francisco Chronicle's policy was to turn down advertisers who charged a fee to persons wishing to shop there, and where again a prospective customer responding to an advertisement might find to his annoyance he had to pay a fee to get into the store (Tr. 2104-2105). After U.S.E. dropped its "closed door" mem-

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randum and no evidence that the memorandum in fact was distributed at a NEMA meeting or that Frigidaire, General Motors or any other appellee had ever received it. In short, there was no foundation for admissibility of the letter against anyone. In any event, the memorandum—contrary to appellants' assertions—has nothing to do with retail prices. The memorandum does mention *wholesale* prices, but on this subject merely sets forth the unidentified writer's opinion that manufacturers and wholesalers of major appliances should not give discriminatory discounts to large-volume retail accounts.

21. The code (Pl. Ex. No. 391) established a voluntary "Standards of Practice" for the San Francisco home furnishings industry. The code dealt with such straightforward topics as unfair competitive claims, misleading advertising layouts, "bait" advertising, prize contests and description of merchandise. The code also spelled out the instances in which certain phrases may be utilized in advertising. The sole reference to "comparative prices" merely specified that "factual proof of a comparative price shall be in possession of the advertiser at the time of its publication."

22. Both newspapers were claimed by appellants to be members of the alleged conspiracy directed against appellants (R. 1914).

bership fee policy in 1961, it was able to advertise in both newspapers (Tr. 2156-2159). At all times before and after 1961 U.S.E. was able to advertise in the evening newspaper, the then San Francisco Call-Bulletin (Tr. 2167-2168).

The policies of the Examiner and the Chronicle as to accepting advertising were of long standing and were applied as a matter of independent business decision (*e.g.*, Tr. 2094). Neither Frigidaire nor any other appellee ever discussed these policies with the newspapers or anyone else (Tr. 4080; 4092) nor was there any evidence that any appellee knew what the policies were or even knew that U.S.E. had any difficulty placing its advertising in any newspapers.

B. Proceedings in the Trial Court.

Appellants' original complaint (R. 1) was filed on August 12, 1960, naming as defendants the appellees, as well as numerous other manufacturers and distributors and five retailers, and alleging that they conspired to boycott appellants. On August 4, 1964, appellants filed their complaint in a second suit (R. 15), making essentially the same claims as in the first suit but updating the period of alleged damages. The two suits were consolidated for trial (R. 1608).

Appellants conducted broad-ranging pretrial discovery, taking dozens of depositions and launching numerous sets of interrogatories and motions to produce. The court held extensive pretrial conferences. The parties were required to prepare pretrial statements and the court framed comprehensive pretrial orders (R. 1431-1478; 1608-1609), which, among other things, defined the basic claims to be tried as follows:

> "a. Did the defendants conspire to restrain interstate trade and commerce in the sale of television sets and major household appliances in San Francisco and pursuant to such a conspiracy prevent plaintiffs from obtaining television sets and major household appliances?
>
> "b. Did the defendants conspire to monopolize interstate trade and commerce in the sale of television sets and

major household appliances in San Francisco and pursuant to such a conspiracy prevent plaintiffs from obtaining television sets and major household appliances?"

A supplementary pretrial order established the order of proof for the trial: Appellants were first to present their evidence on liability prior to reaching the question of the extent (if any) of damages (R. 1608-1609). Under the pretrial procedure established by the court, the parties were required to and did identify their witnesses and proposed exhibits prior to trial (R. 1470-1472).

Trial commenced on September 1, 1965 and continued for some 37 trial days. There was testimony from 51 witnesses (including deposition testimony that was read) and over 500 documents were received in evidence.

At the conclusion of appellants' evidence on the question of liability, appellees moved for directed verdicts and to dismiss. The parties submitted briefs and the court heard full argument on the motions. The court concluded that appellants had failed utterly to present evidence from which any reasonable inference of any conspiracy could be drawn, and that the actions should be dismissed (R. 1912-1976). Judgments were entered on November 26, 1965 (R. 1977). The present appeal followed.

QUESTIONS PRESENTED AND SUMMARY OF ARGUMENT

Although appellants purport to specify many points on appeal (for example, see appellants' 63-page Specification of Errors) and advance numerous contentions, the basic questions on this appeal may be succinctly stated: (1) whether the pretrial rulings that were made regarding pretrial discovery, the conspiracy issues to be tried and the separation of trial on the issues of liability and damages, were erroneous and caused substantial prejudice to appellants; (2) whether appellants made out a prima facie case of conspiracy; (3) whether certain items of evidence were improperly excluded with prejudicial effect on appellants' case; and (4) whether costs were properly taxed.

The argument of appellees General Motors and Frigidaire in summary is:

(1) The pretrial rulings were correct. Appellants had abundant pretrial discovery and such limitations as were imposed on appellants' discovery were proper and inconsequential in any event. The court's pretrial definition of the conspiracy issues to be tried was correct and did not result in any prejudice to appellants. The court's order separating the issues of liability and damages for trial likewise was proper, had no impact upon the outcome, but did permit bringing the matter to a conclusion without further lengthy and futile proceedings.

(2) The evidence wholly failed to support any reasonable inference that Frigidaire or General Motors, or any other appellee, conspired in violation of the Sherman Act. On the contrary, the evidence showed appellees acting independently and disparately, and conclusively disproved the existence of any conspiracy.

(3) The trial court's rulings on evidence were sound in law and within the proper exercise of the court's discretion. Appellants were accorded every reasonable opportunity to prove a case.

(4) The court in its discretion properly allowed certain items of costs to appellees.

ARGUMENT

I. Appellants Were Allowed Extraordinarily Full and Virtually Unlimited Pretrial Discovery Against Frigidaire and the Other Appellees; Such Limits as Were Imposed Were Perfectly Proper.

Amidst appellants' grab bag of assorted claims of error is the claim that appellants somehow were not permitted full and complete pretrial discovery. Appellants are none too clear about what discovery actually was denied them (see Appellants' Opening Brief, pp. 172-177), and, as shall be demonstrated, they do not accurately describe the record in this regard. But in any event, appellants were permitted extraordinarily full discovery; such few limitations as the trial court imposed were proper and within the court's discretion.

Appellants voice only three specific grievances over the pre-trial discovery rulings of the trial court relating to Frigidaire or General Motors. None of the grievances has the slightest merit.

A. SO-CALLED "INTRA-COMPANY" MEMORANDA.

Appellants served one of Frigidaire's salesmen, Mr. John Shaw, with a subpoena duces tecum in connection with notice of his deposition. The subpoena was served despite an earlier court ruling in this case that subpoenas under Federal Rule of Civil Procedure 45 are not the proper means to obtain production of documents by a party, without a prior showing of good cause as required by Rule 34 (R. 362-364). Frigidaire agreed to comply with substantially all of the items demanded in the subpoena. These documents were turned over at the deposition of Mr. Shaw on June 12, 1963. Nevertheless, appellants moved for production—still without a showing of good cause as required by Rule 34—of any salesmen's reports pertaining to any conference with any defendant retailer or plaintiffs. The trial court ruled that Frigidaire should produce documents of this character within the guidelines of an earlier production order entered in this case (R. 419-421). Frigidaire did so.

Appellants persisted, however, to importune Frigidaire (and other defendants) for further similar reports and for any written reports or statements of conversations between Frigidaire personnel and any other persons on the acquisition, sale or advertising of television sets or major household appliances by appellants or the retail stores who at that time were defendants to the action (R. 422-425; 745-752; 625-626). Frigidaire pointed out repeatedly that *all such statements or reports had been produced to appellants,* and that it knew of no others (R. 648-649).[23] Appellants never demonstrated the contrary, nor do they even attempt to do so now.

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23. See also Frigidaire's Answer to Plaintiff's Second Set of Interrogatories (R. 803-804).

B. STATEMENTS OR REPORTS OF CONVERSATIONS.

Appellants also complain, at pp. 174-175 of their brief, that they were denied answers to certain interrogatories requesting information as to statements or reports of conversations concerning the purchase, sale or advertising of television sets or major appliances by appellants or the retail defendants (R. 625). Appellants are mistaken. Frigidaire in fact *did* answer the interrogatories, stating that it had previously searched for documents of the nature described and that *all such documents had been produced* (R. 648-649; 803-806).

C. CERTAIN CORRESPONDENCE.

Finally, at pp. 175-177, appellants claim error in certain rulings of the trial court relating to production by the factory (*i.e.,* manufacturing) defendants of various categories of reports and correspondence. Only a few of these challenged rulings involve General Motors (R. 615-616; 977-979). As for item 15 of appellants' motion to produce, filed June 5, 1964 (R. 422, 425) and items 20, 22(c), (d), (e) of plaintiffs' motion to produce filed November 17, 1964 (R. 745; 749-750), General Motors responded that, to the best of its knowledge, it had produced all documents called for by these items (R. 546; 886; 888). Item 27(f) of the November, 1964, motion asked for correspondence relating to any discussions of discount stores at trade association meetings. Appellants made no effort to show that General Motors possessed these documents, or that they had any relevancy to the case. General Motors opposed the motion, arguing that it was a belated effort by appellants which would have required a new and unlimited file search[24] (R. 878; 890). In the exercise of its discretion, the trial court agreed with the General Motors position (R. 979).

Federal Rule of Civil Procedure Rule 34 vests in the District Court wide discretion whether production or inspection of docu-

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24. Appellants had ignored an order of the trial court to have their final motions to produce on file, in Action No. 39336, by July 24, 1964 (R. 879).

ments should be granted. 2A Barron & Holtzoff, Federal Practice & Procedure Section 803 (1961). Discovery is not a matter of unlimited right. On appeal, a trial court's disposition of matters of discovery should be upheld unless the ruling was improvident and affected the substantial rights of the parties. *Martin v. Reynolds Metals Corp.*, 297 F.2d 49, 57 (9th Cir. 1961); *Roebling v. Anderson*, 257 F.2d 615 (D.C. Cir. 1958). Appellants fail to demonstrate that the trial court's rulings on discovery were improvident, nor do appellants show that the few minor discovery rulings against appellants could have had any prejudicial effect upon their case.

II. The Trial Court's Pretrial Order Defining the Nature of the Conspiracy Question Here to Be Tried Was Proper and in Any Event Had No Prejudicial Limiting Effect Upon the Proof at Trial or Upon the Trial Court's Consideration of Appellants' Evidence in Ruling on the Motions for Directed Verdict.

At pp. 130-133 of their Opening Brief, appellants claim error in the pretrial order of the court entered on August 17, 1965 (R. 1608-1609) which established that the basic liability issue to be tried in these cases was whether there had been a conspiracy between the retailer, distributor and manufacturer defendants which violated §§ 1 and 2 of the Sherman Act and resulted in damage to appellants.[25] Appellants complain that the order improperly prevented them from proving the existence of a series of separate—and presumably disconnected—conspiracies, each involving an alleged conspiratorial team comprising a manufacturer, its distributor and the retailers carrying that specific line of merchandise. We submit that the pretrial order was proper and, as applied with practi-

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25. Appellants incorrectly characterize the order as allowing proof only of a "horizontal" conspiracy (Appellants' Opening Brief, p. 130). However, the order explicitly permitted appellants to attempt to prove a conspiracy on all three levels of distribution. Indeed, the defendants who went to trial and the alleged co-conspirators, who were the subject of much of appellants' evidence, included companies on all three levels.

Appellants also mistakenly refer to the pretrial order as dated August 13, *1960*. See Appellants' Opening Brief, p. 130. The pretrial order, of course, was not entered until less than a month before trial. Appellants were deprived of no discovery on account of this articulation of the issues.

cality at the trial, in fact did not preclude the admission of any evidence nor in any way circumscribe the consideration of any of appellants' contentions. On the contrary, at the conclusion of appellants' evidence, the trial court carefully scanned the record for evidence of any conspiracy, vertical, horizontal or otherwise, and found no reasonable inference of any.

The rationale for the pretrial order lay in the clear necessity, in protracted antitrust cases of this nature, to insert a semblance of guidelines to keep the trial within reasonable bounds (P. Tr. of May 28, 1965, page 53, lines 14-18). Wide discretion is ordinarily vested in a trial court in adapting a complex case into manageable shape for trial. *Life Music, Inc. v. Broadcast Music, Inc.*, 31 F.R.D. 3 (S.D.N.Y.), *petition for mandamus denied*, 309 F.2d 242 (2d Cir. 1962). Moreover, the court was clearly free to disregard the pretrial order, if necessary, to modify the legal issues as the trial progressed, if appellants had made any point of the matter. *Cf. Castlegate, Inc. v. National Tea Co.*, 34 F.R.D. 221, 226 (D. Colo. 1963). Appellants, however, did not choose to do so.

Here the trial court's order merely articulated concisely the issues framed by appellants' own complaints (R. 1, 15).[26] There was nothing in the complaints that apprised appellees of the "vertical" conspiracy theory of appellants.[27] Not until mid-1965, on the eve

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26. Thus, the complaints asserted a conspiracy between the defendants to violate Sections 1 and 2 of the Sherman Act "by contracting, combining, conspiring together and each with the other, and with other co-conspirators, in restraint and monopoly of such trade and commerce. . . ." See R. 8, Complaint, Action No. 39336, p. 7, particularly lines 21-23; R. 21, Complaint, Action No. 42674, p. 7, particularly lines 5-7.

27. Paragraphs 7(a) and 7(b) of the complaint, invoked by appellants, are immediately preceded by the allegation, "defendants, in combination and conspiracy in restraint of such interstate trade and commerce, have and continue to do the following things pursuant to and in furtherance of the said combination and conspiracy:" (R. 9, Complaint, Action No. 39336, p. 8, ll. 4-8; R. 21, Complaint, Action No. 42674, p. 7, ll. 19-22.)

Appellants also refer to paragraph 10 of the complaint. However, paragraph 11 in each action expressly provided "each of the defendants have combined and conspired each with the other, to do and perform each of the acts alleged in paragraph 10." (R. 11-12, Complaint, Action No.

of trial, did appellants belatedly attempt to introduce into the trial what *appeared* to be separate and distinct charges of nine separate and presumably unrelated vertical conspiracies, involving what then *appeared* to be different evidence. Had appellees been suitably forewarned, they at least would have been able to move for a separate statement of claims (Federal Rules of Civil Procedure, Rule 10) and for severance (Rules 20(b), 21 and 42(b)).

The potential prejudice to appellees was aggravated by the nature of appellants' case, with its mass of evidence and numerous defendants and alleged co-conspirators as well as the potential unfairness of a mass trial involving so many various charges. *Krulewitch v. United States,* 336 U.S. 440, 446-447 (1949) (concurring opinion); *Kotteakos v. United States,* 328 U.S. 750, 772-773 (1946).

But even if there had been error in the pretrial order—which there was not—appellants were not prejudiced in the least. Notwithstanding the pretrial order, throughout the trial appellants were allowed to introduce evidence in support of any theory of alleged conspiracy, whether denominated horizontal or vertical. There was no instance during the trial—and none is now cited by appellants—in which evidence was excluded on the authority of the August 13, 1965 Pretrial Order.

In connection with the delineation of the trial issues at the pretrial conference, appellants filed an Offer of Proof specifying the evidence they intended to offer in support of their newly conceived vertical conspiracy argument (R. 1481). As the record demonstrates, virtually every one of the many items specified were offered in evidence by appellants at the trial and almost all were received.[28] The relatively few items excluded were ruled inadmissible because they were hearsay or not properly authenticated or

39336, p. 10, l. 31 to p. 11, l. 1; R. 24, Complaint, Action No. 42674, p. 10, ll. 11-13.)

28. However, the hopes and expectations expressed by appellants in their Offer of Proof were not fulfilled: the evidence did not prove what appellants said it would prove and the witnesses did not testify as appellants had predicted. As an example, appellants predicted (R. 1485) that they would prove that an employee of Graybar (the Hotpoint distributor) had talked with representatives of Broadway-Hale shortly before Manfree lost the Hotpoint line, but the facts turned out to be to the contrary (Tr. 3271-3272).

on other grounds unrelated to the pretrial order of August 13, 1965.[29]

Thus the pretrial order had no effect on the admissibility of evidence at the trial, as the trial court consistently applied a policy of liberal admissibility. Nor in deciding the motions for directed verdict did the trial court consider itself bound by any particular conceptual limits of conspiratorial theory. The court's Memorandum Opinion reflects a clear purpose to review all the facts in evidence in the total context of the case.[30] Throughout the opinion the court, without applying any labels of "vertical" or "horizontal" conspiracy, knocks out any possible underpinnings of appellants' vertical conspiracy theory. The posture of the case required the court to analyze the dealings between each set of appellee (or alleged co-conspirator) manufacturer, distributor and retail outlet, as to pricing practices, advertising policy, and understandings (there were none) as to discount stores in San Francisco. The Memorandum Opinion canvassed each such vertical series, including the arrangements among General Motors (manufacturer), Frigidaire Sales Corporation (distributor), Broadway-Hale and other retail stores, as well as the interstitial relations between and among each and every permutation of these sets.[31] The court found that no reasonable inference of conspiracy radiated from any of these groupings, horizontal or vertical.

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29. In the portion of their brief relating to the trial court's evidence rulings, appellants now argue that some of these items were erroneously excluded. However, appellants do not contend that any of the unfavorable rulings were based on the pretrial order of August 13, 1965. See discussion of appellants' arguments in Part V of this brief, *infra*.

30. See Memorandum Opinion, R. 1918:

> "Bearing in mind the difficulties encountered in the proof of a conspiracy and giving plaintiffs the full benefit of the great mass and volume of evidence produced and without attempting to compartmentalize the various factual components thereof and wiping the slate clean after scrutiny of each . . . ."

Compare *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).

31. For example, the trial court found that "evidence as to the course of dealings with the five retailers varies widely from one distributor to another. Plaintiff seizes on each *different and varying set of circumstances*, no matter how inconsistent, to argue that the five retailers 'called the tune' in San Francisco . . . ." Memorandum Opinion, R. 1947. (Emphasis added.)

III. The Trial Court Properly Separated the Issues of Liability and Damages for Trial, and This Ruling Had No Prejudicial Impact on Appellants' Case.

The trial of these cases was bifurcated, pursuant to the August 13, 1965 Pretrial Order of the court, into separate presentations on the issue of liability and on the issue of the amount (if any) of damages (R. 1608-1609). It was expressly ordered, however, that these separate showings would have to be made before the same jury. (*Ibid.*) No opportunity arose for appellants to put on the damage phase of their case, since the trial court granted appellees' motions for directed verdicts on the issue of liability.[32] Appellants now complain, at pp. 133-135 of their brief, that the bifurcation of the trial somehow constituted reversible error.

Rule 42(b) of the Federal Rules of Civil Procedure expressly authorizes the separate trial of discrete issues, such as occurred here.[33] Separate trials on the issue of liability and damages have been utilized in numerous cases.[34] Use of this technique to simplify and expedite the trial of antitrust cases has been urged by many conversant with the problem.[35]

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32. More than anything else, the finding of no prima facie liability by the trial court confirms the wisdom of having segregated the damages issue.

33. Rule 42(b) provides in part that:
"The court, in furtherance of convenience or to avoid prejudice . . . may order a separate trial . . . of any separate issue or of any number of . . . issues. . . ."

34. *E.g., Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963); *Hayden v. Chalfant Press, Inc.*, 281 F.2d 543 (9th Cir. 1960); *Hosie v. Chicago & N.W. Ry.*, 282 F.2d 639 (7th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961); *State Wholesale Grocers v. Great Atl. & Pac. Tea Co.*, 258 F.2d 831 (7th Cir. 1958), *cert. denied*, 358 U.S. 947 (1959); *Orbo Theatre Corp. v. Loew's, Inc.*, 156 F. Supp. 770 (D.D.C. 1957), *aff'd*, 261 F.2d 380 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 943 (1959); *Nettles v. General Acc. Fire & Life Assur. Corp.*, 234 F.2d 243 (5th Cir. 1956).

35. *E.g.*, Judicial Conference of the United States, *Handbook of Recommended Procedures for the Trial of Protracted Cases*, pp. 51-52, 99 note 28 (1960). See also *Seaboard Terminals Corp. v. Standard Oil Co. of New Jersey*, 30 F. Supp. 671, 672 (S.D.N.Y. 1939).

Appellants' arguments seem to be that separate trials are inappropriate in antitrust cases, and that appellants somehow were hampered in showing the "impact" of the alleged conspiracy (Appellants' Opening Brief, pp. 134-135). But these arguments verge on the absurd, and have utterly no realistic application to the present matter.

The threshold problem faced by appellants was to prove the existence of a conspiracy. This they failed to do, although permitted great latitude by the court. Quite obviously it was better to call a halt to the matter after the failure of appellants' conspiracy claim than to prolong the trial while appellants put in additional futile, lengthy proof on their alleged damages. And it makes no sense whatever for appellants now to complain that they were prejudiced by their inability to put on proof of damages or impact;[36] the granting of the directed verdicts in no way depended upon the question of impact or damages.

IV. The Trial Court Properly Granted the Motions for Directed Verdict; There Was No Evidence Which Would Support Any Fair or Reasonable Inference of Any Conspiracy Involving Frigidaire or Any Other Appellee.

At the conclusion of appellants' case, no evidence of a conspiracy—whether horizontal or vertical—had been presented. It was clear, from an evaluation of the entire record, *Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690, 699 (1962), that no reasonable inference of a conspiratorial boycott to deprive Manfree of television sets and major household appliances could be drawn. The trial court accordingly determined that the motions for directed verdict should be granted.

In its Memorandum Opinion, the trial court enunciated the standards it applied in granting the motion, as follows:

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36. The only evidence that appellants claim was improperly excluded because of the bifurcated trial ruling is Pl. Ex. for Id. Nos. 1500 and 1500-1. These exhibits are a schedule purporting to show a decline in Manfree's sales and profits from 1957 to 1964. However, appellants offered the schedule only to show that they had been injured (Tr. 5940). For a discussion of the propriety of the ruling excluding the schedule, see Part V(A)(5) of this brief, *infra.*

> "Before the Court can grant a motion for a directed verdict and thus withdraw the case from the jury, as a matter of law it must be convinced that no jury could reasonably bring in a verdict for the plaintiffs, and it must arrive at this conclusion after reviewing and considering the evidence as a whole in the light most favorable to plaintiffs and after giving the plaintiffs the benefit of all inferences which the evidence fairly supports, even though contrary inferences might be reasonably drawn." (R. 1916)

As the Memorandum Opinion shows, the trial court followed the well established test. *Continental Ore Co. v. Union Carbide & Carbon Corp., supra; Girardi v. Gates Rubber Co. Sales Div., Inc.,* 325 F.2d 196 (9th Cir. 1963); *Independent Iron Works, Inc. v. United States Steel Corp.,* 322 F.2d 656, 661 (9th Cir.), *cert. denied,* 375 U.S. 922 (1963); *Safeway Stores v. Fannan,* 308 F.2d 94 (9th Cir. 1962); *Delaware Valley Marine Supply Co. v. American Tobacco Co.,* 297 F.2d 199 (3d Cir. 1961), *cert. denied,* 369 U.S. 839 (1962).

That the present cases concern a claim of conspiracy does not take them out of the established rule. The existence of an alleged agreement or conspiracy is a fact which, like other facts, must be proved by competent evidence, direct or circumstantial. There must be evidence that permits a reasonable inference that there in fact was an agreement or commitment to a common scheme. *Independent Iron Works, Inc. v. United States Steel Corp., supra; Girardi v. Gates Rubber Co. Sales Div., Inc., supra; United States v. Standard Oil Co.,* 316 F.2d 884, 890 (7th Cir. 1963); *Standard Oil Co. of California v. Moore,* 251 F.2d 188, 210-211 (9th Cir. 1957), *cert. denied,* 356 U.S. 975 (1958).[37] Speculation, surmise

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37. Appellants endeavor to construct a parallel between the facts concerned in the present appeal and the facts in *Standard Oil Co. of California v. Moore, supra.* In the *Moore* case, this Court held that the plaintiff had made out a prima facie case of conspiracy, but reversed a jury verdict for plaintiff because important evidence—indeed, the evidence on which the sufficiency of plaintiff's case depended (251 F.2d at 217)—had been erroneously admitted. In no pertinent respect does the *Moore* case bear any similarity to the present cases. In *Moore* there was substantial evidence that the defendants not only acted identically in their marketing policies and

or conjecture are not enough to take such a case to the jury. Nor is there a prima facie case where the evidence shows merely that the parties acted similarly, unless the circumstances logically suggest that the similarity was because of joint action. *Independent Iron Works, Inc. v. United States Steel Corp., supra,* 322 F.2d 656, 661.

In the present cases there was no competent evidence—direct or circumstantial—that would have justified submitting the matter to the jury as to General Motors, Frigidaire or any other appellee. It was more than a simple failure of proof; here the evidence that plaintiffs so laboriously introduced throughout the lengthy trial positively disproved their own fanciful theories of conspiracy. The evidence shows General Motors, Frigidaire and each of the other appellees acting independently and differently from one another, without any common plan, indeed without any knowledge or understanding of one another's plans and intentions.

Before we proceed to an examination of the relatively small amount of evidence concerning General Motors and Frigidaire, we shall take up the major items of evidence destroying appellants' theory that there was any conspiracy involving any appellee.

A. ALL OF APPELLANTS' THEORIES OF CONSPIRACY WERE DESTROYED BY THE EVIDENCE.

1. The witnesses who would have known of any alleged conspiracy denied there was one.

There was no direct evidence of any conspiracy, and appellants conceded as much (R. 1439). Appellants therefore have endeavored to construct their case from circumstantial evidence and, in particular, argue that appellants acted uniformly and that from this unexplained uniformity, a trier of fact should

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in refusing to sell to the plaintiff, but had acted cooperatively and in concert to boycott price-cutting dealers such as Moore, and communicated with one another concerning the boycott (251 F.2d at 207-209).

Nor is there the slightest parallel between the present cases and *United States v. General Motors Corp.,* 384 U.S. 127 (1966), cited by appellants. There the Supreme Court found abundant evidence of explicit agreement, and of cooperative efforts to "police" a program of deterring automobile dealers from selling to "discount houses." The opinion of the Court states in part that ". . . joint and collaborative action was pervasive in the initiation, execution, and fulfillment of the plan." 384 U.S. at 143.

infer conspiracy.[38] Appellants cite the landmark case of *Interstate Circuit, Inc. v. United States,* 306 U.S. 208 (1939), in which it was held that evidence of an explicit written invitation to join in a common scheme, coupled with evidence that the parties in fact had subsequently acted identically, comprised sufficient proof to support an inference of conspiracy—where the parties gave no explanation of their behavior and did not deny that an agreement had been reached. The Court spelled this out as follows:

> "Taken together, the circumstances of the case which we have mentioned, when uncontradicted and with no more explanation than the record affords, justify the inference that the distributors acted in concert and in common agreement in imposing the restrictions . . . .
>
> "This inference was supported and strengthened when the distributors, with like unanimity, failed to tender the testimony, at their command, of any officer or agent of a distributor who knew, or was in a position to know, whether in fact an agreement had been reached among them for concerted action." *Id.* at 225.

In the present cases the witnesses not only fully explained their conduct (of which more will be said below) but expressly denied that there was any agreement or conspiracy (*e.g.,* Frigidaire at Tr. 4282-4283; 4094-4095 and 4322; Broadway-Hale at Tr. 445; 1337 and 1541; General Electric at Tr. 4399 and 5299-5300).[39] Of

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38. As we shall demonstrate, appellees did not act uniformly and their conduct was fully explained as normal, independent, nonconspiratorial, business behavior.

39. Conscious of this defect in their cases, appellants argue that the testimony of each witness somehow was impeached (Appellants' Opening Brief, pp. 121-122), and in this effort distort and misstate the record. For example, appellants accuse Mr. Thomas, one of the Broadway-Hale witnesses, of throwing away business records, implying that relevant facts thus were concealed, when the record shows only that the witness cleaned out his own desk when Broadway-Hale went out of the appliance and television business in 1963; there is no indication whatsoever that anything was thrown away of any significance to these cases (Tr. 1527-1528). Appellants also assert that this same witness "filed false and misleading answers to interrogatories" (Appellants Opening Brief, p. 122), but the record of the trial where this matter was gone into in detail shows that appellants' irresponsible charge is false (Tr. 1441-1445).

course, a trier of fact would not be compelled to believe this testimony if there were evidence to the contrary. *Girardi v. Gates Rubber Co. Sales Div., Inc.*, 325 F.2d 196 (9th Cir. 1963). But here there was no contrary evidence.

2. The decisions not to sell to appellant Manfree were made independently and were supported by independent business reasons.

Appellants argue that there was a uniform pattern of refusals to deal with Manfree and that the refusals were largely unexplained or that the explanations were obscure or specious and should be disregarded. In fact the pattern of contacts between appellee distributors and Manfree (and other distributors and Manfree) is anything but uniform; at most the evidence showed a series of independent decisions arrived at unilaterally.[40]

Of the four appellees who were in a position to sell to Manfree (the three distributor appellees, plus General Electric, which sold its "General Electric" brand merchandise directly to retailers), California Electric Supply sold Philco merchandise to Manfree from about May 10, 1957 to September 12, 1958, Maytag West Coast sold Maytag appliances to Manfree from January of 1958 to March of 1959, General Electric had discussions with Manfree in the years 1958 to 1960 but decided not to franchise Manfree, and Frigidaire was not asked by Manfree for a franchise until 1960 and then declined to make Manfree a dealer. It is hardly surprising that none of these appellees took Manfree on as a dealer

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40. Appellants argue that this evidence of independent business decisions should be disregarded, citing *Standard Oil Co. v. Moore, supra,* (Appellants' Opening Brief, pp. 97, 102-103). But appellants misread the *Moore* decision, which held merely that testimony by defendants that they acted out of independent business motives was not dispositive where this testimony *was contradicted by substantial evidence of conspiracy.* 251 F.2d 188, 211. Compare *Independent Iron Works, Inc. v. United States Steel Corp., supra,* where—as in the present cases—evidence of independent business behavior stood uncontradicted, justifying directed verdicts for defendants. 322 F.2d 656, 661.

after suit was filed in 1960.[41] At various times Manfree handled the Hotpoint and Norge lines, purchasing them from independent distributors.[42]

In each instance where a decision was made not to sell to Manfree, there were independent, nonconspiratorial business reasons. California Electric Supply ceased selling to Manfree because the latter's purchases dropped off and Manfree indicated a lack of interest in the line (Tr. 3692-3693). Maytag West Coast allowed Manfree's dealer franchise to expire because Manfree's personnel were apathetic about selling Maytag and rebuffed efforts to give them dealer training, U.S.E. was a membership operation which restricted potential sales, and the manager of Manfree's appliance sales had a drinking problem and was offensive to customers (Tr. 3376-3379; 3428). At the same time that Manfree's Maytag dealership was allowed to expire, 20 to 30 other Maytag dealers in San Francisco, including Lachman Bros. and Sterling, likewise were dropped (Tr. 3332-3333). Frigidaire concluded not to franchise Manfree because Manfree had a cramped, unattractive appliance department and simply did not appear to be a promising dealer prospect (Tr. 4317-4321). Such distributors other than appellees as decided not to sell to Manfree also had their own independent reasons. For example, the distributor of Norge products took exception to U.S.E.'s use of "bait and switch" advertising of appliances (Tr. 2867-2869). Thus, the evidence utterly failed to show that appellees—or any other of the alleged

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41. Appellants would, in effect, impute a duty on the part of the vendor appellees to sell to Manfree because suit was filed, citing *Bergen Drug Co. v. Parke, Davis & Co.*, 307 F.2d 725 (3d Cir. 1962). See Appellants' Opening Brief, pp. 100-101. This is not the law. Moreover, none of the appellees has ever contended that the filing of the litigation, *ipso facto*, constituted sufficient cause not to deal with Manfree. The *Bergen* case is distinguishable: it arose in the context of a motion for *preliminary injunction*. There the plaintiff's existing business was cut off by defendant *after* initiation of the lawsuit. The court was influenced by the fact that the conduct of the litigation could have otherwise been frustrated. Compare *Hutchinson v. American Oil Co.*, 221 F. Supp. 728, 732 (E.D. Pa. 1963). Frigidaire, of course, never dealt with Manfree before or after the filing of these cases.

42. Manfree also carried major lines of other companies such as Sylvania (Tr. 5714; 5824-5825).

co-conspirators—followed any pattern of conduct with respect to appellants that would support any inference of conspiracy. On the contrary, there was nothing mysterious, nothing unexplained, and nothing other than straightforward, understandable, independent business decisions.

3. There was a lack of relevant communications between any of the appellees.

For a conspiratorial agreement or understanding to have arisen, there obviously would have had to be some form of communication between the conspirators and some knowledge of each other's plans and intentions. *Federal Trade Comm'n v. Cement Institute,* 333 U.S. 683, 716 note 17 (1948); *Standard Oil Co. of California v. Moore,* 251 F.2d 188, 211-212 (9th Cir. 1957), *cert. denied,* 356 U.S. 975 (1958). Here again appellants argue that this was something for the trier of fact to infer—but again the argument flies in the face of the facts. The record is wholly deficient in evidence of communications between any of the appellees (or between appellees and any of the alleged co-conspirators) on the subjects that appellants assert were part of the alleged conspiracy: the question of selling to Manfree, the alleged policy of not selling to discount houses and the alleged insistence upon adherence to list prices. On such a crucial question as the decisions that were made by distributors whether or not to sell to Manfree, the record makes it quite clear that one distributor did not know what another was doing or planning to do (*e.g.,* Tr. 3276; 4194-4195; 4283; 4322). For example, the evidence is uncontradicted that Frigidaire did not discuss with any other distributor, or any manufacturer, or any dealer—or anyone else—the question of whether it would franchise Manfree (Tr. 4079-4080; 4283; 4321) and that Frigidaire had no knowledge of what the plans or intentions of other distributors were in this respect (Tr. 4063-4069; 4283-4284). Nor did any of the appellees, whether manufacturer or distributor, discuss San Francisco discount stores with any other appellee (*e.g.,* Tr. 1214; 3592; 4068).

Appellants try to emulate the examples set in some other antitrust cases and point to the existence of various associations, such as NEMA, the Northern California Electrical Bureau (NCEB)[43] and the San Francisco Better Business Bureau, suggesting that these may have served as a breeding ground of conspiracy. But again—notwithstanding appellants' distortions and misstatements of the record—the evidence showed nothing more than mere membership by some appellees in some associations, and meetings at which nothing occurred relevant to the present suits.

4. Appellees had no uniform policy of refusing to deal with discount houses.

Appellants constantly reiterate the assertion that the vendor appellees and alleged co-conspirators had a joint and uniform policy of not selling to so-called "discount houses" in the San Francisco area and that this demonstrates that there was a conspiracy to boycott appellants who, of course, purported to be a discount house.

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43. Appellants tried to show that members of the NCEB, including Frigidaire, had conspired at its meetings to boycott "discount" stores in San Francisco. The testimony of all the witnesses questioned about the organization rebutted any such implication, and denied that the matter of prices or discount stores had ever been discussed at those meetings (*e.g.*, Tr. 919-920; 985; 3131; 3142; 4063-4071). The NCEB, it developed, was an association composed of all elements of the electrical industry in Northern California, not limited to the appliance industry (Tr. 3129-3130). NCEB was open to all industry members, and embraced manufacturers, distributors, retailers and others (Tr. 3130). Appellants' only "evidence" of their charge was Pl. Ex. No. 2090, which comprised minutes of a NCEB committee meeting to promote the sale of dishwashers (Tr. 972-979). The dishwasher campaign, open to all retailers of every participating brand, was co-sponsored with Pacific Gas & Electric Company (Tr. 3134; 1953). The campaign was merely directed at sales of dishwashers generally (Tr. 4282; 4286). Retailers were compensated for allowing a five-day trial period to customers (Pl. Ex. No. 2090). In order to qualify for reimbursement, a retailer had to submit a claim form, indicating, among other things, the model number and list price of each dishwasher sold. The witnesses cleared up the reason for this information: the promotion was conducted only for deluxe model dishwashers, and the data was needed to verify dealer compliance with this rule (Tr. 4069-4070; 980-983). It had no bearing on what price the dishwashers were sold at (Tr. 980). There was no exchange of pricing information nor any attempt to secure maintenance of suggested list prices in San Francisco (Tr. 4068-4071).

But the evidence disproves any theory that appellees had any uniform policy of refusing to sell to discount houses. Indeed, at various periods of time, Manfree *did* purchase merchandise manufactured or distributed by certain of the appellees, including the Philco, Maytag, Norge and Hotpoint brands. At the same time, another discount house in San Francisco, GET, was a franchised dealer for a number of major brand appliances and televisions, including Hotpoint (Tr. 6073-6074; 3185-3186), Norge (Tr. 2895) and Westinghouse (Tr. 6169). Many of appellees' brands were also sold to other discount houses in the San Francisco area, including White Front[44] (Tr. 4376-4382).

In the case of appellants, the evidence showed that such problems as they may have experienced from time to time in obtaining merchandise arose for reasons other than their operation as a self-styled "discount house." Admittedly, the fact that from the time they commenced business in 1957 until 1961, appellants operated as a "closed-door" membership store—unlike most other discount houses[45]—was considered by some (but not all) of the distributors to make appellants a less desirable retail outlet than outlets open to all the public. Obviously a store operated as a "closed-front" store limited its range of customers, and might even alienate those who objected to paying a so-called membership fee that went into the pockets of the storeowners.

5. There was no uniform policy of selling, tagging or advertising at suggested list prices.

Appellants argue that appellees and the alleged co-conspirators had the uniform practice of requiring television sets and household appliances to be tagged, advertised and sold at no less than suggested list prices. The relevance of this argument is not as clear as appellants seem to think. Appellants' theory, of course, is that because they held themselves out to be "discounters" and

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44. White Front advertising indicated that it was carrying General Electric, R.C.A., Whirlpool, Philco and Norge lines of appliances and television sets at a discount (Appellants' Opening Brief, p. 76).

45. White Front, by contrast, was not a *closed-door* store.

advertised "discount" prices, appellees boycotted them.[46] But the testimony of appellants' appliance manager showed that U.S.E. frequently advertised the numerous lines of television and household appliances it carried without specifying *any* prices in the advertisements (Tr. 5647),[47] and while appellants assert that Manfree priced its merchandise for sale at "cost" (which was not clearly defined), plus 20%, the record does not show that Manfree's prices in fact were any lower than those charged by other San Francisco retailers.[48] In any event, the evidence demonstrated that appellees and the alleged co-conspirators had no uniform practice with respect to the selling, tagging or advertising of merchandise at suggested list prices. Some manufacturers furnished schedules of suggested retail list prices to their distributors and in some instances these schedules were passed on to the latter's dealers. In other instances distributors independently constructed their own suggested retail price sheets and furnished them to dealers. And in other instances no suggested retail prices at all were furnished to dealers. For example, commencing in 1960 with its 1961 models, Frigidaire promulgated no suggested retail price lists at all (Tr. 4086). Frigidaire decided to abandon any circulation of suggested prices because dealers ignored them

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46. In at least one instance in which price advertising was used, U.S.E. was shown to have advertised an R.C.A. radio at *higher* than the suggested list price (Tr. 4824; R.C.A. Ex. No. 11007). Broadway-Hale sometimes advertised its prices as "low discount prices" (Tr. 1321).

47. Throughout the trial and in their brief, appellants assumed as proven that U.S.E.'s style of selling set it apart from other San Francisco retailers. The record shows just the opposite. The appliance division manager of Broadway-Hale, for example, testified that he considered U.S.E. no more competitive to Broadway-Hale than any other San Francisco retailer (Tr. 1363-1364).

48. The only evidence appellants point to on this question is that Broadway-Hale *would have liked* to have achieved—but in fact did not achieve—a markup of 30% or more (Pl. Ex. Nos. 349 and 350; Tr. 270-271; 3436). Some of the list prices suggested by distributors would have permitted a markup of approximately 30% but again the evidence showed the general practice of San Francisco retailers to sell below such list prices as existed (*e.g.*, Tr. 901; 2352-2353; 3289; 5029; 5646; 5648-5649). At least one witness confirmed that U.S.E.'s prices on refrigerators were "no bargain," and were about "the going price" (Tr. 4318).

anyway and Frigidaire believed the level of prices actually charged to consumers was substantially below the retail prices Frigidaire previously had suggested (Tr. 4085-4092).

It is clear that there is nothing in the least illegal about furnishing lists of suggested retail prices to dealers. Even had dealers actually followed the practice of selling at suggested prices, this would have been no violation of the law. *Klein v. American Luggage Works, Inc.*, 323 F.2d 787, 791 (3d Cir. 1963). But in the present cases the record shows without contradiction that retailers in San Francisco frequently and generally sold at prices other than whatever prices may have been suggested to them (*e.g.*, Tr. 1453; 4085-4086; 5029). Appellants' own officers admitted this (*e.g.*, Tr. 5646; 5648-5649) and admitted that Broadway-Hale was one of the biggest discounters in San Francisco (Tr. 5646).

Nor was there any common practice of advertising or tagging at suggested list prices. Again the uncontradicted evidence showed that retailers frequently advertised below whatever list prices were suggested to them (Tr. 1431-1433; 1450; 1515-1516; 2352-2353) and again Broadway-Hale was one of those that often advertised "discount" prices (Tr. 209; 430; 729-730; 1321; 5646). A person could find six different prices on the same piece of merchandise in six stores (Tr. 1183). A few distributors at times would extend cooperative advertising allowances to dealers only for such advertising as featured suggested retail prices—but even then the dealers could advertise at any prices they chose if they wished to pay the entire cost of their own advertising. Other distributors granted advertising allowances to dealers regardless of what prices were featured in the advertising, including General Electric (Tr. 1431-1432; 5225), Maytag West Coast (Tr. 3383-3384)[49] and Frigidaire (Tr. 4088).

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49. Evidence was introduced of many specific instances in which Maytag dealers, including Broadway-Hale, received advertising allowances for below-list advertising (Maytag Ex. Nos. 13034-13041; 13043-13047; 13049-13054A; 13060; 13069-13070; 13074-13077; 13091-13112; 13114; 13120-13121; 13124-13127; 13133-13136; 13138-13140.) See also Tr. 3384-3403.

6. There was no agreement or joint action to exclude appellants' advertising from the San Francisco newspapers.

Appellants' all-pervasive paranoia is exhibited again in their theory that appellees joined with certain retailers, the San Francisco morning (but not evening) newspapers and other alleged co-conspirators to keep appellants from advertising in those newspapers. However appellants may juggle the facts, this theory comes to nothing.

At all times U.S.E. advertised in the San Francisco Call-Bulletin, then an evening newspaper in San Francisco (Tr. 2168). So did many other retailers, including some of the alleged retail co-conspirators (Tr. 297-299). In the period up to 1961, both the San Francisco Examiner and the San Francisco Chronicle (each then morning newspapers) declined, for different reasons, to accept U.S.E.'s advertising copy. Each newspaper had its own previously established policy that precluded acceptance of such advertising. Contrary to the assertions at pages 119-120 of Appellants' Opening Brief, neither newspaper had a policy against carrying advertising of discount houses[50] (Tr. 6880-6891; 2096). Instead, both newspapers were concerned about the reactions of their readers who might respond to advertising and then be confronted by some "membership" or "fee" gimmick that prevented them from purchasing advertised merchandise. The Examiner would not carry advertising of "membership" or "closed door" stores (Tr. 2094), and the Chronicle would not carry advertising of stores that charged an entrance fee (Tr. 2104-2105). After U.S.E. dropped its membership requirement and its entrance fee in 1961, it had no difficulty advertising in either newspaper (Tr. 2156-2159).

Now how does all this show that Frigidaire or General Motors, or any appellee, conspired with anyone to do anything? It doesn't. For example, there was no evidence that Frigidaire or General Motors ever discussed U.S.E.'s advertising with the newspapers or with retailers or anyone else, or knew of the decisions of the

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50. Broadway-Hale on occasion advertised its "low discount prices" (Tr. 1321).

Examiner or the Chronicle not to accept advertising from U.S.E. or had even the slightest interest in the matter (Tr. 4080). Nor is the evidence significantly different as to any other appellee or retailer.

B. THE EVIDENCE DEMONSTRATED THAT APPELLEES GENERAL MOTORS AND FRIGIDAIRE DID NOT CONSPIRE WITH ANYONE.

Notwithstanding the lengthy trial and the hundreds of exhibits, there was little evidence that had any bearing on appellees General Motors or Frigidaire.[51] However, what little evidence there was demonstrated clearly that neither appellee conspired with anyone. As the trial court observed in its Memorandum Opinion:

> "Plaintiffs have failed to make a case against General Motors or Frigidaire. There is no evidence from which a jury could reasonably or fairly infer that General Motors or Frigidaire knew of any conspiracy, committed themselves to one or participated in a conspiracy." (R. 1952)

1. General Motors did not conspire with anyone.

There was virtually no evidence as to General Motors. General Motors manufactures Frigidaire appliances and then sells them to its wholly owned subsidiary, Frigidaire Sales Corporation, which in turn distributes them to retailers. General Motors sells to no retailers and has no dealings of any sort with them. General Motors had no part in any decision whether or not to sell to Manfree or, for that matter, to any other retailer; this was solely within the jurisdiction of Frigidaire. General Motors' sole contact with appellants occurred in July, 1960, when it received one of a number of form letters sent out by appellants (as a predicate to filing suit) requesting to buy merchandise (Pl. Ex. No. 492). The letter immediately was forwarded to the Frigidaire Sales

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51. And even in Appellants' Opening Brief, Frigidaire and General Motors are seldom mentioned and then usually only as part of some disparate group of companies which appellants lump together for some mistaken and undocumented generalization.

Corporation branch in Northern California, and from that point on General Motors had nothing further to do with the matter.[52]

2. Frigidaire did not conspire with anyone.

The relevant evidence relating to Frigidaire Sales Corporation can be quickly stated.

Until receipt of the July, 1960, letter from appellants, Frigidaire had been unaware that Manfree had any interest in a Frigidaire dealership (Tr. 4083; 4222; 4281; 4309).[53] Gilbert Hamilton, the local Frigidaire sales manager, immediately responded to the letter by telephoning U.S.E.[54] Hamilton talked to Mr. Freeman of Manfree and arranged to have a salesman visit Manfree (Tr. 4029-4030; 4032).[55] A few days later John Shaw, a Frigidaire salesman, inspected the Manfree operation (Tr. 4312-4321). Shaw

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52. Appellants also inaugurated a second series of demand letters in 1961. One of these (Pl. Ex. No. 497) was directed to General Motors. This letter was promptly forwarded to the Frigidaire branch office (Pl. Ex. No. 4270).

53. The only prior contacts Frigidaire had with appellants consisted of two routine calls made by a Frigidaire salesman on U.S.E. in 1957 and 1958 as part of a survey of appliance dealers in San Francisco. The evidence does not indicate that appellants asked to buy from Frigidaire or that they requested a Frigidaire franchise on the occasion of those calls. The only recollection any of appellants' witnesses had of these calls was that Mr. Freeman of Manfree recalled being introduced to someone from Frigidaire (Tr. 5825).

54. Appellants tried unsuccessfully to read some mischief into the fact that Hamilton's notes of the conversation had been partially erased (Pl. Ex. No. 491; Tr. 4023-4037). Appellants even ordered infrared photographs of the handwriting in an effort to reconstruct the writing (Pl. Ex. Nos. 1828-1829). Only a few fragmentary words could be made out, but these were unconnected and meaningless, and contribute nothing to this case. Some of the marks had apparently been added by appellants' handwriting expert (Tr. 4036). Hamilton explained that he had made notes on the demand letter during his conversation with Freeman, and may have later erased some of his notes to make them clearer (Tr. 4027-4028). He could only speculate on what the notes had been (Tr. 4033-4034). Appellants never bothered to call an expert as a witness.

55. In his testimony Freeman essentially confirmed the Hamilton account of the telephone conversation. However, Freeman also understood Hamilton to say that Frigidaire did not sell to any closed-door discount

subsequently reported back to his superior Hamilton; both decided they were uninterested in franchising Manfree at that time (Tr. 4039-4041). Shortly thereafter and without any further communication between appellants and Frigidaire, appellants, without bothering to hear Frigidaire's decision, filed suit.

The reasons why Frigidaire did not—within the short period between Shaw's visit and the commencement of the suit—decide to franchise Manfree were fully explored at the trial. The Manfree setup was small, unattractive and there was simply nothing there that led Shaw to believe that Manfree had any appeal as a prospective Frigidaire dealer[56] (Tr. 4317-4321). The fact that unlike other retailers[57] who opened their doors to the public, U.S.E. was then a "closed door" store, open only to certain categories of customers, who, in addition, had to pay a membership fee, did not enhance its appeal,[58] although this was not a determinative factor with Frigidaire (Tr. 4320).

Frigidaire consistently pursued its policy of strictly limiting the number of its franchised dealers and taking on as new dealers only those who satisfied rather stringent criteria (Tr. 4319). Manfree did not measure up to those standards. In 1960 Frigidaire was in the course of reducing the number of its dealers in San Francisco in order to concentrate its line in a relatively few

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houses (Tr. 5828; 6037-6038). Appellants misleadingly fragmentize the record in their assertion that Hamilton told Freeman that Frigidaire would not sell to San Francisco discount stores (Appellants' Opening Brief, p. 68). Freeman clearly understood Hamilton to be referring to closed-door discount houses, and he so testified (Tr. 6037-6038).

56. Besides the unappealing nature of the U.S.E. setup, Shaw also received the impression that Manfree was not really interested in a Frigidaire franchise, with all of the attendant obligations of service and the like (Tr. 4316). Manfree simply evinced a desire to buy some Frigidaire merchandise (*Ibid.*).

57. Whether or not a retailer was an "*open*-door" store, of course, had no bearing on its pricing practices, and no bearing on whether it held itself out to be a "discount house." White Front, among others, was an *open*-door discount house.

58. U.S.E. itself decided to become an open-door store in 1961, a year after suit was brought (Pl. Ex. No. 497).

loyal and enthusiastic dealers who would aggressively merchandise the line[59] (Tr. 4072).

Thus there was nothing mysterious or unexplained about Frigidaire's decision not to franchise Manfree. On the contrary, the evidence showed, without contradiction, that Frigidaire made its decision independently and for normal business reasons. There is no evidence that Frigidaire ever discussed with anyone else the question of selling to Manfree; the Frigidaire witnesses flatly denied there had been any such discussions (Tr. 4079; 4282-4283; 4322). Nor was there any evidence that Frigidaire had any knowledge as to the decisions other distributors had made or intended to make with respect to selling to Manfree (Tr. 4284).

The Frigidaire decision not to franchise Manfree was *not* arrived at because of any conspiracy to sell or advertise appliances at suggested list prices. As we have demonstrated, there was no such conspiracy; there was not even uniformity or similarity of conduct among the appellees. Suggested list prices were not even promulgated by all the manufacturers or all of the distributors. For example, for much of the period involved in these cases, Frigidaire did not publish the suggested list prices, having concluded in 1960 that they served no purpose[60] (Tr. 4086). During the period

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59. Appellants misstate the record in their assertion that representatives of Frigidaire testified that sales to Manfree would have placed the local dealer structureship "in a precarious position" (Appellants' Opening Brief, p. 115). There was no such testimony. Indeed, Frigidaire was itself consciously cutting down its dealerships in San Francisco during this period in order to upgrade the dealers which had potential (Tr. 4071-4072). Appellants suggest that Frigidaire was forced to choose between "downtown" outlets and U.S.E. The record shows, however, only that Frigidaire concluded, as a result of its market survey, that it was poorly represented in the downtown area of San Francisco (Tr. 4305-4306). Frigidaire filled this need by franchising the White House department store, which was not one of the alleged retail co-conspirators (Tr. 4316).

60. Appellants' efforts to dispute this were futile. They attempted to introduce two Frigidaire price sheets which happened to contain handwritten prices in the margins. The handwriting had apparently been inserted by retail employees, and definitely not by Frigidaire. See the discussion in Part V(A)(1) of this Brief, *infra.*

One other try of appellants in this respect should be commented upon. From their Opening Brief at p. 132, an inference could be drawn that Pl.

when Frigidaire had suggested list prices, its dealers generally sold below them (Tr. 4086) and frequently advertised at less than the suggested prices (Tr. 4087-4088). Frigidaire exercised no control whatsoever over the prices actually charged by dealers or used by dealers in advertising Frigidaire appliances (*e.g.*, Tr. 1315-1316). Indeed, Frigidaire through advertising allowances even *subsidized* dealers who advertised at below-list prices. The uncontradicted evidence showed that Frigidaire had granted advertising allowances to dealers irrespective of what prices were being used in their advertising and often gave allowances for below-list advertising (Tr. 4087-4092).[61]

The Frigidaire decision not to franchise Manfree was *not* arrived at because of any conspiracy to refuse to sell to discount houses. As we have demonstrated, there was no such conspiracy and there was not even similarity of conduct among appellees. A number of distributors sold to Manfree itself at various times and to other discount houses in the area. Frigidaire sold to many dealers who sold and advertised prices below suggested list. Admittedly, Frigidaire considered it a somewhat unfavorable factor that appellants were a "closed-door" store—but appellants eventually recognized this themselves (after suit had been brought) and opened their doors to the public without charge.

The Frigidaire decision not to franchise Manfree was *not* arrived at because of any conspiracy to favor the alleged retail coconspirators. Again, there was no such conspiracy and the relations

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Ex. for Id. No. 5050 rebuts the Frigidaire change of pricing policy in 1960. This exhibit, however, does no such thing. It is discussed solely in connection with General Electric's Hotpoint Division (Tr. 5453-5454; Specification of Errors, p. xx), and has nothing to do with Frigidaire.

61. When Frigidaire furnished its dealers with advertising materials used in various promotions, it expressly omitted any reference to price (Tr. 1866; 4088). Appellants mistakenly argue that Frigidaire did require advertising to be at suggested list in order to qualify for an advertising allowance. The sole evidence appellants point to is a 1955-1957 Frigidaire advertising manual (Pl. Ex. No. 338) from which appellants quote at page 35 of their brief. But the portion of the old manual appellants quote shows on its face that the only advertising in which Frigidaire had the policy of using suggested list prices was advertising run nationally or locally *by Frigidaire itself*—and not advertising run by dealers.

between appellees and the five retailers did not even manifest a pattern of uniform conduct.[62] Frigidaire itself had terminated three of the five retailers—including Broadway-Hale—prior to the time Manfree asked for a Frigidaire franchise (Frigidaire Ex. No. 14003). Frigidaire lost another one of the retailers when Sterling Furniture went out of business in San Francisco during the period involved in these suits.

Finally, Frigidaire's decision not to franchise Manfree was *not* arrived at because of anything having to do with the San Francisco morning newspapers, the San Francisco Better Business Bureau or any trade association activities. The evidence is uncontradicted that Frigidaire knew nothing about the advertising policies of the newspapers or any difficulties that appellants had in placing advertising (Tr. 4080; 4092) and that Frigidaire did not belong to or attend any meetings of the San Francisco Better Business Bureau or the EIA (Tr. 1754; Pl. Ex. for Id. No. 3011). Although Frigidaire was a member of NEMA and AHLMA and its representatives attended some meetings of these associations, nothing of any relevancy was shown to have occurred.

In short, the evidence as to Frigidaire and General Motors presented a complete failure of proof that they conspired with anyone to do anything. But it was more than a failure of proof. The evidence affirmatively showed, without contradiction, that Frigidaire's decision not to franchise Manfree was arrived at independently for normal, understandable business reasons. The trial court clearly had no alternative but to grant the motions of Frigidaire and General Motors for directed verdicts.

V. Exclusions of Evidence by the Trial Court Were Proper.

Appellants urge, as a subsidiary ground of appeal, that various evidence rulings of the trial court were erroneous. Appellants

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62. It should be noted that even had it been true that appellee distributors each favored their old, well-established customers, this would have been perfectly normal, independent business behavior and would have given rise to no inference of conspiracy. See *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656, 663 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963); *Windsor Theatre Co. v. Walbrook Amusement Co.*, 189 F.2d 797, 798-799 (4th Cir. 1951).

have undertaken a heavy burden. It is a basic principle that cases are not to be reversed for errors in rulings on evidence or other matters unless they "affect the substantial rights of the parties." 28 U.S.C. § 2111 (1964). See *Palmer v. Hoffman,* 318 U.S. 109 (1943); *Segal v. Cook,* 329 F.2d 278 (6th Cir. 1964).

Of course, before they can reach the question of alleged prejudicial effect emanating from exclusion of evidence, appellants must show that the trial court rulings were erroneous. This they cannot do. The trial court was faced with a sizeable task in ruling on the admissibility of evidence. Appellants did nothing to ease the court's burden. Appellants went into the trial with the apparent strategy of introducing in evidence (often in random order) hundreds of documents and the testimony of dozens of witnesses, all in the hope that out of this welter of repetitive and largely irrelevant evidence, some suggestion of a claim might emerge. The trial court acted with patience and restraint; in ruling on the admissibility of evidence it gave appellants great leeway. But it was necessary to impose some limits, to exclude some evidence because it was purely cumulative or without any conceivable relevancy or obviously inadmissible hearsay or otherwise without proper foundation. And in every instance, it is submitted, the court's rulings were proper.

A. EXCLUDED EVIDENCE PERTAINING TO FRIGIDAIRE OR GENERAL MOTORS.

Out of the melange of testimony and documents offered by appellants, relatively little pertained to Frigidaire or General Motors, and virtually all of that was received in evidence. Appellants complain of the exclusion of only a few items that can be said to relate to Frigidaire or General Motors. As we shall demonstrate, each of these items was properly excluded but even if it had been admitted it could have had no conceivable impact upon the outcome of the trial.

(1) *Frigidaire Price Sheets.*—Appellants complain[63] of the exclusion of certain Frigidaire price sheets (marked as Pl. Ex. for

63. See Appellants' Opening Brief, p. 152.

Id. Nos. 4170 and 4178) obtained respectively from the files of Lachman Bros. and Redlick's. These price sheets were issued by Frigidaire subsequent to its abandonment in 1960 of publishing suggested retail prices for the guidance of its dealers. Thus, the printed sheets as issued by Frigidaire contain no suggested retail prices, but do contain the wholesale prices that Frigidaire charged to its retailers. The space on the sheets where suggested retail prices had appeared prior to 1960 is left blank.

The significance that appellants claim to discern in the particular price sheets that are part of Exhibits for Identification Nos. 4170 and 4178 is that some handwritten prices have been inserted in the blank spaces on some of the sheets. Appellants argue that these handwritten prices show that Frigidaire continued to suggest retail prices to its dealers in 1960 and thereafter (Appellants' Opening Brief, p. 152). But the facts are to the contrary, and appellants were spectacularly unsuccessful in laying a foundation for admissibility of the handwriting against Frigidaire.

Gilbert Hamilton was the only Frigidaire witness at the trial whom appellant questioned about the price sheets. He acknowledged that the printed portions of the exhibits were price sheets issued by Frigidaire (Tr. 4101-4102). Hamilton knew nothing about the handwritten notations appearing on some of the sheets, could not identify the handwriting, and denied that Frigidaire had orally communicated the handwritten prices or any other suggested prices to its dealers (Tr. 4101-4109).

Through another witness, appellants were able to establish the nature and authorship of the handwritten figures appearing on Exhibit 4170, the Frigidaire price sheets from the files of Lachman Bros. The manager of Lachman's appliance department testified that he or his assistant had written some of *Lachman's* retail prices on the sheets (Tr. 1900-1901). He emphatically stated that he himself had decided on these prices (Tr. 1904) and had not discussed them with any Frigidaire representative (Tr. 1901-1902; 1904; 1910).

As to the price sheets from the files of Redlick's (Ex. for Id. No. 4178), appellants failed to call any witness to identify the source or even the purpose of the handwritten notations on those

sheets. However, appellants' counsel stipulated that the handwriting was *not* on the sheets when Frigidaire sent them to Redlick's (Tr. 2267-2268).

Thus, while the printed price sheets in Exhibits 4170 and 4178 were unquestionably shown to have been issued by Frigidaire—as were other printed price sheets that were received in evidence—appellants failed to demonstrate any foundation for admitting the handwritten notations in evidence against Frigidaire. No connection between Frigidaire and the handwriting was shown; indeed, appellants proved (and stipulated) the contrary. The exhibits were irrelevant and without adequate foundation; the trial court correctly refused to admit them against Frigidaire.

(2) *Quarterly Reports of Advertising Allowances.*—Appellants also complain that the trial court excluded portions of Frigidaire's so-called 1958 "Dealer Advertising and Special Promotional Funds, Quarterly Report."[64] This form showed credits by Frigidaire to dealers for various types of advertising allowances during 1958 (Tr. 4257-4258). The full report, not offered in evidence, showed that Frigidaire had granted advertising allowances to numerous dealers in the San Francisco area, and not just the four alleged retail co-conspirators listed in the portion of the report offered by appellants (Tr. 4259).

Frigidaire, of course, never raised any question but that it granted to its dealers—(including *at times* certain of the alleged retail co-conspirators)—various advertising and promotional allowances. This is all the exhibit showed. A great deal of evidence, even though irrelevant, had already been received on this point. See, *e.g.*, Tr. 4088-4092. There was no showing by appellants that Ex. No. 1985 was any more significant than any of the evidence that was admitted (Tr. 4259). It was irrelevant to appellants' case, and was properly excluded.

(3) *Deposition Testimony of Arthur Alpine.*—Appellants claim that the court erroneously excluded from evidence portions of the deposition of the late Arthur Alpine.[65] The reason for the

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64. See Appellants' Opening Brief, p. 159.

65. See Appellants' Opening Brief, pp. 152-156; Specification of Errors, V, H, (c), p. xxxv.

court's ruling was that Alpine's untimely death had deprived appellees of effective cross-examination on certain memoranda involved in the deposition (Tr. 6224-6225; 6251-6252; 6256). It is quite clear from a review of the events surrounding the taking of this deposition that this ruling was correct.

At the time his deposition was taken in 1961, Alpine was president of U.S.E. and a vice-president of Manfree as well as a principal shareholder. At the deposition he testified as to certain conversations with representatives of appellees and as to various memoranda and notes of these conversations. Despite repeated requests by appellees during the deposition to see these memoranda, and to utilize them in cross-examining Alpine, appellants' counsel resolutely refused to produce them (Tr. 6219-6221). The deposition was finally recessed with this issue still unresolved (Tr. 6229; 6231-6232). In January, 1962, one of the defendants directed interrogatories to appellants requesting dates and other foundational facts as to these memoranda, preparatory to a motion to produce (R. 299a-299c). Appellants' counsel secured an extension of time to answer (Tr. 6247). In the meantime, on February 18, 1962, Alpine died (Tr. 6224; 7022). Appellants' counsel nevertheless persisted in his refusal to respond to these interrogatories, so a court order had to be sought (R. 242) and—after three months of disagreement by appellants as to its form (Tr. 6224)—eventually obtained. The documents were not produced until one year after Alpine had died (Tr. 6224). Thus, despite repeated requests, appellees were never able to cross-examine Alpine on his papers and check the consistency of his testimony.

At trial, the court carefully reviewed all of the Alpine deposition transcripts (Tr. 6256) and evaluated the notes and memoranda themselves (Tr. 6251-6252). The court finally excluded only those few portions of the deposition dealing directly with documents as to which appellees had been deprived of an opportunity to cross-examine the witness (Tr. 6251-6252; 6256). It admitted the balance of the deposition.[66]

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66. It is worth noting in this connection that appellants' counsel voluntarily chose not to have the admitted portions of the deposition read to the jury (Tr. 6277).

There is ample precedent for excluding depositions where a deponent has died before completion of cross-examination. This has been the customary rule. *E.g., Continental Can Co. v. Crown Cork & Seal, Inc.,* 39 F.R.D. 354, 356 (E.D. Pa. 1965). The case cited by appellants, *Re-Trac Corp. v. J. W. Speaker Corp.,* 212 F. Supp. 164, 168 (E.D. Wis. 1962), is distinguishable, since plaintiff there had had what appeared to be full cross-examination and had not indicated with particularity the scope or the significance of the matter not completely investigated.

In the instant case, it is clear that appellants' erroneous stand in not initially producing the documents seriously inhibited effective cross-examination of Mr. Alpine, who was clearly not a disinterested witness. The memoranda would have permitted appellees to test the memory of Alpine as to these conversations and to determine whether his testimony was truthful[67] (Tr. 6216-6217). Counsel recognized this (Tr. 6227). Cross-examination, particularly in these circumstances, is far too important a right to be disregarded. *Degelos v. Fidelity & Cas. Co. of New York,* 313 F.2d 809 (5th Cir. 1963). The court's ruling was therefore entirely proper and was indeed necessary to avoid manifest unfairness to appellees.

There was, in any event, no prejudice to appellants arising from exclusion of the few pages of the Alpine deposition relating to Frigidaire.[68] This testimony concerned Shaw's visit to the Manfree premises in response to the July, 1960, letter from appellants, and was largely repetitive of other testimony at the trial from Freeman of Manfree and from Shaw himself (Tr. 4314-4316; Appellants' Specification of Errors, V, H, p. xxxv).

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67. The trial court noted the "extreme difficulty" in ascertaining the dates of the memoranda (Tr. 6251). Although it was claimed the memoranda had been made contemporaneously with Alpine's conversations, the court discerned contrary indications on the face of the memoranda (Tr. 6251-6252). For one thing, the declarations could not have conceivably all been made by the deponent. The handwriting was different. Some of the memoranda were typed. Some contained statements made during the deposition and not found in Alpine's handwritten notes (Tr. 6252).

(4) *Documents Relating to Trade Associations.*—Appellants argue, at pp. 164-165 of their Opening Brief, that there was error in the exclusion of certain exhibits relating to various trade associations such as NEMA, AHLMA and EIA.[69] In every case, appellants failed even to authenticate the documents or lay any foundation for their admissibility. The typical "showing" made by appellants to support admission of these documents was for appellants' counsel to state—without the benefit of sworn testimony or other proof—that the documents had come from somebody's files (*e.g.,* Tr. 3515-3518). In any event, these documents, without exception, were irrelevant and contained nothing bearing on the issue of conspiracy.

Pl. Ex. for Id. No. 2093 purports to be NEMA minutes of a meeting of its Consumers Products Division's board of directors held in October of 1961.[70] A passing reference made therein to "mass merchandising" is seized upon by appellants as evidence of a national conspiracy against discount houses. But all that the minutes—largely a string of unrelated excerpts—observe is that sale of major appliances by mass merchandisers "makes it difficult to identify what the retail business really is," referring to the difficulty of obtaining statistical data as to such sales. No more is said about the topic in Ex. No. 2093.

Pl. Ex. for Id. No. 2094, also purportedly NEMA committee minutes, notes that some members had proposed improved techniques for reporting industry sales by requesting so-called "mass merchandisers"—not single outlet retail stores such as Manfree or U.S.E.—to set up records showing the destination of appliance shipments. The idea was dropped at the same meeting, and the matter was left to the individual member companies. It was later decided that NEMA would not even participate in drafting a form letter for use by companies (Pl. Ex. for Id. No. 2095). There is nothing in these exhibits, then, more than a concern about im-

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69. Frigidaire was not even affiliated with the latter organization (Pl. Ex. for Id. No. 3011).

70. As an example of appellants' misreading of these documents, its counsel stated at trial that Frigidaire and Philco representatives were present at this meeting (Tr. 6459). Yet the document states on its face that these members were *absent* from the meeting (Pl. Ex. No. 2093).

proving collection of sales data, and this was ultimately abandoned.

Pl. Ex. for Id. No. 3010, purportedly consisting of minutes of a special NEMA-AHLMA committee on dealer classifications, is equally irrelevant. The purported minutes merely reflect an effort by the industry to arrive at a correct definition of "mass merchandisers" for ascertaining the amount of business done by this class. Mass merchandisers did not readily fit existing industry classifications, so the committee undertook to describe, as precisely as possible, their distinguishing features and thereby define this class.

Appellants also complain of the exclusion of Pl. Ex. for Id. Nos. 2097 (A, F, S) and 2098 (A, M) as proof of the policies of NEMA and AHLMA to restrict dissemination of industry statistical data, gathered through their efforts, to their own members. This is the only purpose for which these exhibits were offered. As such, they are irrelevant and meaningless, as well as hearsay.

Complaint is also leveled at the exclusion, for irrelevancy, hearsay and foundation reasons, of Pl. Ex. for Id. Nos. 2099 (A, G, H, O), 3000 (A, M), 3004 (A, K), 3036 (E-AF) and 3024. These exhibits were offered for the purpose of establishing that NEMA and AHLMA members had agreed to exchange information on retail sales of their products by price classification. Appellants have misread their exhibits. Ex. No. 2099, for example, related to institution of a quarterly report of sales of electric dishwashers, as broken down by fairly broad *factory* price categories. There is no suggestion that prices of individual manufacturers would be disclosed to association members. Ex. No. 3000 doesn't even yield this type of information. Only one of the many statistical sheets in this exhibit carries a manufacturer's factory price breakdown in a report of industry sales, and even here the figures are lumped together since there is no company sales or price breakdown. The same is true of Ex. Nos. 3004, 3024 and 3036, which are more of the same.[71] The exhibits were clearly inadmissible as hearsay, and totally irrelevant to appellants' case.

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71. In fact, Ex. No. 3004 shows that special precautions were taken by combining categories "in order to avoid possible disclosure of individual company business." (Ex. No. 3004, Form S-342, p. 4.)

One other exhibit (Pl. Ex. for Id. No. 431), referred to throughout Appellants' Opening Brief, should be mentioned at this juncture. This exhibit, attached as "Exhibit B" to appellants' brief, is a letter, over the rubber-stamped name of Judson Sayre of Norge Sales, apparently addressed to other Norge employees, and transmitting to them a memorandum that the letter says was handed out at a NEMA meeting. Neither the letter nor the memorandum ever was authenticated. There was never any showing of who was the author of the attached memorandum, or that it in fact had been received by Frigidaire or General Motors or by any of the other appellees. Moreover, contrary to appellants' assertion, the document doesn't show a meeting to discuss a nationwide retail price-system for appliances. The memorandum merely states the opinion of someone—never identified by appellants—that each manufacturer in establishing its own wholesale prices, should not give special discounts to large-volume retailers. The memorandum does not urge, or even hint, that members should charge the same price as their competitors. There is no mention at all of the question of retail prices to the consumer. Ex. No. 431 is totally irrelevant and inadmissible as hearsay.

(5) *Studies Prepared by Appellants.*—The only other excluded evidence offered by appellants against Frigidaire (among other appellees) comprises a series of studies undertaken by appellants' accountants,[72] the bulk of which purportedly were based upon fragmentary documents obtained from the files of the alleged co-conspirator retailers. These exhibits were properly excluded on grounds of relevancy, hearsay, and lack of foundation.[73]

The first set of these exhibits consisted of studies *purporting* to show that three of the five alleged retail co-conspirators often adopted suggested list prices as the prices to be tagged on the merchandise. See Pl. Ex. for Id. Nos. 1561-1578 (Broadway-Hale); 1579-1681 (Lachman Bros.); and 1560 (Redlick's). But on voir dire examination it quickly became apparent that these exhibits did

72. Most or all of the studies actually were not prepared by appellants' witness, Mr. Victor Honig, but by a member of his staff (Tr. 6365).

73. See Appellants' Opening Brief, pp. 166-167.

not show actual tag prices at all, were grossly inaccurate, hopelessly garbled and without any semblance either of relevancy or proper foundation. At the outset appellants' witness made it clear that there was no foundation for admissibility against Frigidaire[74] or any other appellees. None of the documents or information used in preparing the exhibits came from appellees' files or records; the witness had received certain documents from appellants' counsel, and apparently these were purchase invoices that counsel at some time had obtained from the retailers (Tr. 6373-6374). The witness did not know what the figures on the invoices actually meant, but acting on instructions from appellants' counsel he assumed that certain markup figures represented tag prices (Tr. 6386-6387; 6397). He had no idea what prices the retailers in fact had tagged on the merchandise, nor what the actual sales prices were (Tr. 6377; 6382-6383). The witness used various arbitrary limitations that he could not explain (Tr. 6384-6385) and could not even say whether any substantial share of the purchase invoices he used in his study related to the San Francisco area (Tr. 6380-6381).

The same deficiencies appeared in the second group of tabulations prepared by appellants' accountants, and offered in evidence by appellants. These were Pl. Ex. for Id. Nos. 4334, 4336 and 4340, purporting to show the dollar volume of purchases of the alleged retail co-conspirators from the distributor appellees and others, and Nos. 4335, 4337, 4339, 1491 and 1492, purporting to enumerate instances of cooperative advertising credits given to the retailers. This evidence was properly excluded on relevancy and hearsay grounds and lack of foundation.

Again it appeared that these exhibits had been tabulated from some documents furnished to the accountants by appellants' coun-

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74. The only such exhibit purporting to relate to Frigidaire merchandise was Pl. Ex. for Id. No. 1572, which was based solely upon a single invoice apparently issued by Broadway-Hale during the year 1958 for the purchase of Frigidaire appliances (Tr. 6397). The witness could not explain why he took certain figures off the invoice for use in his "study" rather than other, different figures that appeared to be equally, or more, applicable (Tr. 6397-6398).

sel, who evidently had obtained them from the retailers (Tr. 6325-6326). The accountants apparently included intermingled data relating to stores outside of San Francisco in preparing the exhibits (Tr. 6334-6336; 6341-6342; 6353-6354; 6362). The retailers who were the subject of these studies had a number of stores located outside of San Francisco (Tr. 6334-6335; 6360-6361). The accountants made no effort to check the figures in the tabulations against the books and records of the retailers (Tr. 6334; 6343; 6350), and could not represent that the source documents used in making the tabulations were correct or even by any means complete (Tr. 6334; 6343; 6356-6357).

The final accounting exhibits offered by appellants, but excluded, were Pl. Ex. for Id. Nos. 1500 and 1500-1,[75] purporting to show Manfree's sales and profits during the years 1957-1964. There was no real exploration of the foundation or accuracy of these exhibits, for the court properly excluded them as irrelevant to the issue under consideration in the initial stage of the split trial: whether there had been a conspiracy (Tr. 5940; 6363).

Appellants now argue that these exhibits were relevant because they "showed the boycott's effect upon Manfree's business in relation to the brands of appellee and co-conspirator vendors, and was therefore further proof of their violation of the antitrust laws." (Appellants' Opening Brief, p. 167.) Appellants proceed from this mind-boggling declaration to another: "Evidence of the impact of a conspiracy is relevant to the proof of the conspiracy itself."[76] (*Ibid.*) Appellants have not even attempted to demonstrate how Manfree's sales and profit figures would have had any bearing on the question of whether a conspiracy existed. Certainly such figures *would* have been pertinent to the

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75. Actually, appellants appear confused as to the exact identification of the Manfree study. There was only one such study (Ex. No. 1500) marked at trial. "Ex. No. 1500-1" does not appear to have been offered.

76. Appellants cite *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), but that case stands for a contrary proposition—that under some circumstances *impact* can be inferred as causally related to an antitrust violation on account of the nature of a *proven* conspiracy—*not* that impact proves there was a conspiracy. 370 U.S. 690, 697.

issue of damages—had that issue ever been reached—and indeed would have opened up a lengthy and time-consuming inquiry into Manfree's financial affairs. It was precisely the purpose of the court's pretrial order separating the conspiracy and damage issues for trial, to avoid such an inquiry if (as was the case here) it was unnecessary.

B. OTHER EVIDENCE EXCLUDED.

Appellants also complain about the exclusion of certain other items of evidence which do not pertain to Frigidaire or General Motors, but instead relate to other appellees or to non-parties. No foundation for the admissibility of this evidence against Frigidaire or General Motors was ever laid by appellants.

Appellants did claim that some of this evidence should have been admitted against all the appellees as comprising the declarations of co-conspirators. However, since there was never any proof of a conspiracy, or that any of the appellees or any others were members of a conspiracy, nor any proof that the alleged declarations were made pursuant to or in furtherance of a conspiracy, that theory of admissibility does not apply.[77] *Flintkote Co. v. Lysfjord,* 246 F.2d 368, 386 (9th Cir.), *cert. denied,* 355 U.S. 835 (1957); *United States v. General Elec. Co.,* 82 F. Supp. 753, 872 (D.N.J. 1949). See also *Krulewitch v. United States,* 336 U.S. 440 (1949).

Despite the patent inapplicability of all of this excluded evidence to Frigidaire and General Motors, certain of the challenged evidence rulings are taken up in this Brief—simply on account of appellants' reliance on these rulings as establishing prejudicial error.[77a]

(1) *Evidence of Affiliations of Local Retailers with the Better Business Bureau.*—Appellants claim error in the trial court's

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77. Thus, a proper foundation must be laid as a prerequisite, despite the unrestricted discretion of the trial court in establishing the order of proof. *Esco Corp. v. United States,* 340 F.2d 1000, 1009 (9th Cir. 1965).

77a. To minimize the repetition of arguments in the briefs of other appellees, we have omitted discussion of evidence rulings challenged by appellants where such rulings related to evidence offered solely against other appellees now represented on this appeal.

exclusion of certain documents—actually a hodgepodge of irrelevancy and inadmissible hearsay—relating to the participation of the alleged co-conspirators in the San Francisco Better Business Bureau. The excluded items[78] were entirely from the files of Broadway-Hale, Lachman Bros. or Redlick's (Appellants' Opening Brief, pp. 157-158).

Appellants' theory appears to be that within the respectable confines of the Better Business Bureau, an invidious conspiracy was at work in which the alleged retail co-conspirators were acting to fix prices, boycott U.S.E., and keep U.S.E.'s advertising out of the newspapers. Much evidence pertaining to the Better Business Bureau in fact was admitted, and all it disclosed was that the retailers were members,[79] that misleading advertising was a subject of concern to the Better Business Bureau, and that some meetings had been held at which a code of proposed advertising standards was discussed. No connection of any sort was disclosed between Frigidaire or any other appellee and these Better Business Bureau activities. Frigidaire was not even a member of the Better Business Bureau.

The Better Business Bureau evidence that appellants' claim was erroneously excluded was even more irrelevant than the admitted evidence. An example is Pl. Ex. for Id. No. 453, which pertains to complaints by the Better Business Bureau that Broadway-Hale was utilizing deceptive advertising. Ex. No. 453 itself is a letter to the Better Business Bureau from Broadway-Hale in which Broadway-Hale promises to be more careful in its advertising claims in the future, and states in part:

> "This points to the fact that we retailers must exert extreme care and take the necessary time to check out all statements, price comparatives, etc. This is not an easy task. However, we want you to know that we intend to do everything we can to prevent errors in our advertisements."

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78. Pl. Ex. for Id. Nos. 453, 384, 390, 391, 393-A, 396-A, 400, 403 and 404.

79. U.S.E. itself was a member of the Better Business Bureau (Tr. 6054).

Appellants' misreading of this letter is symptomatic of their desperate and continual efforts to make something out of nothing. Appellants claim that the letter states "that all San Francisco retailers must *jointly* check out all 'comparative price' claims made in retail advertising. . . ." (Appellants' Specification of Errors, p. xlix.) (Emphasis added.)

Even as misconstrued by appellants, the other "Better Business Bureau" exhibits that were excluded amount to nothing. Some are minutes of Better Business Bureau meetings or notices of such meetings (Ex. Nos. 390, 391 and 400). One has nothing to do with the Better Business Bureau at all, but is merely a letter from Sterling Furniture to the R.C.A. distributor Meyer, expressing pleasure over a recent luncheon engagement (Ex. No. 403). Another is an expense voucher relating to a luncheon meeting between representatives of the Call Bulletin and representatives of Sterling Furniture, which was an advertiser in the Call Bulletin (Ex. No. 404).[80] Thus, the excluded "Better Business Bureau" evidence was nothing but a mass of irrelevant hearsay from the files of the retailers, unconnected to any appellee, and proving nothing as to anyone. It was properly excluded.

(2) *Evidence as to the San Francisco Call Bulletin.*—Appellants also predicate error on a ruling of the trial court striking a portion of the testimony of a former employee of the San Francisco Call Bulletin, Mr. Mittelman, who was also an employee of

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80. Appellants argue, at p. 158 of their brief, that it can be inferred that something conspiratorial transpired at this Sterling Furniture-Call Bulletin luncheon meeting, but there was no evidence of this. The excluded exhibit in any event showed only that a meeting took place. No one disputed the fact of the meeting (Tr. 5694-5697); indeed, appellees stipulated that there was such a meeting. (*Ibid.*)

Appellants also argue that the inability of the witnesses to recall precisely what occurred at the meeting permits an inference in favor of appellants (Appellants' Opening Brief, p. 158). The authority cited for this proposition, *Girardi v. Gates Rubber Co. Sales Div., Inc.*, 325 F.2d 196, 203 (9th Cir. 1963), doesn't support it at all. In *Girardi,* there had been a written admission by the witness, which, together with other facts, justified disbelief by the jury in the witness' testimony that he couldn't recall the facts alluded to in his letter. There was, of course, no evidence of any such written—or verbal—statements by any of the witnesses in this case.

U.S.E.[81] Appellants attempted to solicit Mr. Mittelman's recollection of a conversation with *another Call Bulletin advertising employee* regarding discount store advertising. The testimony was properly barred on hearsay grounds, and as concerning declarations made by a representative of a party not named as a co-conspirator (Tr. 2123-2135). Appellants never contended that the Call Bulletin was a co-conspirator in this case. (*Ibid.*) Compare *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 386 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957), holding that statements *made even by a co-conspirator* are inadmissible against other alleged conspirators if no prima facie showing of a conspiracy has been made. *United States v. General Elec. Co.*, 82 F. Supp. 753, 872 (D.N.J. 1949). See also *Syracuse Broadcasting Corp. v. Newhouse*, 236 F.2d 522 (2d Cir. 1956).

(3) *Evidence as to the Klor's Lawsuit.*—Appellants complain that the court improperly excluded the testimony of a Mr. Sam Fractenberg (Appellants' Opening Brief, pp. 168-169). Some years previously Fractenberg had been an officer of Klor's Inc., a San Francisco retailer that itself had been plaintiff in an earlier treble-damage suit.[82]

The trial court excluded the Fractenberg testimony (Tr. 5682-5684) because appellants had not listed Mr. Fractenberg or any other Klor's witness in their pretrial statement, although the court had specifically required the parties to identify their witnesses prior to trial.[83] (See appellants' pretrial list of witnesses at R. 1500.) Appellants gave no reason—and there was none—for

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81. See Appellants' Opening Brief, pp. 158-159.

82. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). In the cited decision, the Supreme Court reversed summary judgment for the defendants. Subsequently, when the case was remanded to the District Court, plaintiff Klor's dismissed all defendants except General Electric, went to trial against General Electric and the latter obtained a directed verdict at the close of plaintiff's evidence. The directed verdict was not appealed.

83. Local Court Rule 4(11) requires such a listing in a party's Pretrial Statement.

their oversight in failing to name any Klor's representative in their pretrial witness list.[84]

The purpose of requiring a pretrial listing of witnesses, of course, is to permit parties to prepare adequately for trial, to prepare to cross-examine, to assemble such documents or other factual information as may be pertinent and, if need be, to have witnesses available to rebut the anticipated testimony. It was particularly essential that such a procedure be followed in the present cases, involving as they did, dozens of witnesses and hundreds of documents. Other courts in similar situations have upheld "the need to maintain a system of orderly procedure for preparation and trial." *Thompson v. Calmar S.S. Corp.,* 331 F.2d 657, 662 (3d Cir.), *cert. denied,* 379 U.S. 913 (1964), where the court affirmed an order refusing to allow a witness to testify as to the *facts* of an accident where he had been identified only as an expert witness prior to trial. See also *Taggart v. Vermont Transp. Co.,* 32 F.R.D. 587 (E.D. Pa. 1963), *aff'd,* 325 F.2d 1002 (3d Cir. 1964).

However, the proposed testimony was of doubtful relevancy at best. Klor's Inc. had gone out of business before U.S.E. ever opened its doors (Tr. 5677). The tendered testimony would have pertained solely to events from June, 1955 to January, 1957 (Tr. 5668; 5681-5682). Further, a number of the appellees were not involved in the Klor's case at all (for example, Frigidaire and General Motors were not; see Tr. 5682).

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84. During the trial appellants also sought to read the deposition of Mr. Klor taken in *Klor's, Inc. v. Broadway-Hale Stores, Inc., supra.* This offer was properly rejected for a variety of reasons; among other things, the deposition had been taken in a different lawsuit in which the issues were different and many of the parties in the present suits had not been involved, and of course had had no opportunity to cross-examine (Tr. 1359-1360). And again appellants had not identified the deposition in their pretrial listing of evidence. Appellants state at p. 168 of their Opening Brief, that after appellants first broached their plans, during the trial itself, to introduce these witnesses, the court had "allowed appellants to call Mr. George Klor" as a live witness but that Klor was ill and could not appear. This is somewhat misleading; the court at no time ruled that it would permit Klor to testify but rather expressly reserved a ruling on this question until such time as appellants actually called him as a witness (Tr. 1359-1360). Klor himself was never called as a witness.

Testimony by a witness from a totally different case would have diverted the trial into an extended exploration of unrelated facts, all of which predated the relevant period in this case. As this Court observed in affirming the exclusion of similarly collateral evidence on relevancy grounds in *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656, 670 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963):

> "[A]n excursion into each of these incidental matters could and probably would result in a tremendous proliferation of proof which would literally overwhelm the jury with diversionary facts and extend the trial interminably."

The testimony of Mr. Fractenberg was properly excluded.

(4) *Miscellaneous Evidence Points Raised by Appellants.*— Finally, appellants raise a variety of miscellaneous complaints about rulings on evidence. These are somewhat difficult to classify. In a number of instances it is not clear what appellants are complaining about even after careful study of their Opening Brief and Specification of Errors. None of appellants' complaints—explained or unexplained—is meritorious.

(a) *Rejected Evidence as to Miscellaneous Purported Requests for Merchandise*

Appellants complain that the court erroneously rejected a minor amount of evidence as to appellants' written or oral requests for merchandise, in particular a few requests directed to various non-defendants (Appellants' Opening Brief, pp. 160-161). Objections were properly sustained to this evidence on grounds of irrelevancy, hearsay, lack of foundation or that it was cumulative. It would serve no purpose for us to describe each of these separate rulings; appellants themselves have not seen fit to do so. Appellants have failed to demonstrate how exclusion of this evidence in any way could have had any effect on the outcome of the trial.

For example, appellants complain about exclusion of Pl. Ex. for Id. Nos. 1759, 1760, 1761 and 1762, purporting to be correspondence between appellants and Motorola concerning Motorola television sets. Appellants neglected to introduce proof that the letters

in fact had been sent or received (Tr. 5977). Even had a foundation been laid, the letters were cumulative; there already was testimony that Manfree had attempted to purchase from Motorola (Tr. 5822-5823) and another of appellants' form letters requesting Motorola merchandise was admitted in evidence (Ex. No. 4201). Appellants complain that some other such letters—Ex. Nos. 1754 and 1756—were rejected (Specification of Errors, p. xiv) but in fact these exhibits were *received* in evidence (Tr. 5977).

The oral testimony that appellants' claim should not have been excluded was of a similarly trivial nature and was correctly excluded. For example, the testimony of one of appellants' witnesses, Mr. Boyd, was stricken concerning a conversation between him and Mr. Newby, a purported Westinghouse employee, where no foundation had been laid as to Newby's authority to speak for his company (Tr. 5624-5630).[85] *Flintkote Co. v. Lysfjord,* 246 F.2d 568, 584-585 (9th Cir.), *cert. denied,* 355 U.S. 835 (1957). But the stricken testimony was simply to the effect that Newby had said he had no authority to decide whether or not Westinghouse would sell to Manfree (Tr. 5554).

(b) *Miscellaneous Evidence as to Westinghouse*

Appellants argue that certain Westinghouse internal memoranda were improperly excluded and that this inhibited appellants' examination of Mr. Hangauer, a Westinghouse witness (Appellants' Opening Brief, p. 162). The exhibits referred to by appellants were Pl. Ex. for Id. Nos. 352 and 479-481. Appellants again are careless with the record. The bulk of Ex. No. 352 was read into the record (Tr. 6157). The other exhibits were excluded because they were inadmissible hearsay. They were simply a collection of field reports by Westinghouse salesmen containing a variety of opinions and rumors mostly without even a semblance of relevancy (Tr. 6151; 6483-6485). Mr. Hangauer, the Westinghouse witness, had no personal knowledge of the contents of the

85. The record showed that Newby became a Westinghouse District Sales Manager two years after the alleged conversation with Mr. Boyd (Tr. 5626).

reports. (*Ibid.*) The reports were correctly excluded as hearsay. *Standard Oil Co. of California v. Moore,* 251 F.2d 188, 210, 218 (9th Cir. 1957), *cert. denied,* 356 U.S. 975 (1958).

Appellants suggest that the excluded Westinghouse evidence would have shown that Westinghouse thought it could not sell to discount houses and department stores at the same time (Appellants' Opening Brief, p. 162). However, Westinghouse in fact did sell—and continued to sell—to GET, a San Francisco discount house (Tr. 6169), as well as other discount stores (Tr. 6146) and to a variety of other retail stores, including department stores (Pl. Ex. Nos. 4207; 4218).

(c) *Supposed Rulings that Various Witnesses were not Hostile or Adverse*

Appellants argue that the court erroneously ruled that certain of the witnesses called by appellants who were former employees of appellees or alleged co-conspirators were not adverse or hostile (Appellants' Opening Brief, pp. 170-171). Neither in their brief nor in their Specification of Errors do appellants demonstrate what it is they really are complaining about, what the rulings really were or that appellants were prejudiced in any way by the rulings. This is yet another instance in which appellants imply that the record contains things that in fact are not there. As an example, appellants complain, at p. 170 of their Opening Brief, that the trial court erroneously held that the testimony of a Mr. Sanford would not "bind" Broadway-Hale. Sanford left the employ of Broadway-Hale in 1959 (Tr. 504), some six years prior to trial. Appellants' counsel had Sanford on the stand for several days, cross-examined him, used leading questions and numerous times was allowed to attempt to impeach him. The Sanford testimony, of course, was not considered by the trial court to be "binding" on appellants, in ruling on the motions for directed verdict. Indeed, all that it comes down to is that a request by appellants' counsel at the beginning of the examination for a ruling that Sanford was a hostile witness was denied by the court because foundation for such a ruling had not by that time been established (Tr. 519-520).

(d) *Supposed Limitations on Cross-Examination or Redirect Examination*

Appellants make the charge that they were not permitted to impeach or fully cross-examine some of the witnesses or to rehabilitate their own witnesses (Appellants' Opening Brief, pp. 171-172). Again, appellants complain about something but do not discharge their obligation to this Court to explain what it is they are complaining about. The only specific example they discuss in their Opening Brief[86] is a trivial instance in which the court sustained objections to some questions that appellants asked their own witness, Mr. Freeman, concerning whether the misleading "bait and switch" advertising utilized by U.S.E. on occasion had also been used by some other retailers (Tr. 6056-6057).[87] Appellants never explained how it would have been relevant to show that while U.S.E. used misleading advertising, this was somehow excused because of similar conduct of some other retailers.

VI. The Trial Court Taxed Costs in a Proper Manner.

The final point of appellants' appeal centers around the taxation of costs by the trial court[88] (R. 1977-1979). After a lengthy hearing (Tr. 6919-7029), the trial court halved the cost bills filed by the appellees and Broadway-Hale, and taxed costs in the amount of $22,088.69.[89]

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86. At pp. li-lii of their Specification of Errors, appellants cite transcript references supposedly showing some other instances but do not describe these instances. Presumably, appellants would put the burden on appellees and this Court to review the record and figure out what appellants' argument is.

87. Appellants also produced an exhibit consisting of two Los Angeles newspaper advertisements, which the court excluded (Pl. Ex. for Id. No. 5111; Tr. 6056-6057).

88. Execution of costs taxed on the judgment was ordered stayed pending this appeal (R. 2062).

89. The bill of costs of General Motors and Frigidaire had sought the sum of $9,455.69 (R. 2003). These appellees were allowed costs of $5,520.79 (R. 1979). Costs in the aggregate of $45,054.52 had been claimed by the appellees and Broadway-Hale.

Appellants object now to four general categories of allowable expenses[90] which were prorated among the appellees and Broadway-Hale.[91]

(1) *Trial Transcripts.*—The first of these categories comprises the costs of two copies of trial transcripts prepared on a daily basis. This was proper since there were ten defendants at the trial. The trial extended over a ten-week period. Numerous witnesses were called to testify. Almost 7,000 pages of trial transcript were generated by appellants.

The criteria for the allowance of trial transcript costs have been codified in part. See 28 U.S.C. § 1920(2) (1964).[92] Courts—including this Court—have added considerable gloss to this statute. It is now fairly clear that a district court may, in its discretion, tax the costs of copies of trial transcripts for the prevailing party. See *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656, 677-678 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963), where the case—also involving charges of a group boycott—had been involved and complex.[93] This Court noted there the need of counsel for a complete, accurate, and readily available record of the trial and pre-trial proceedings. In *Twentieth*

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90. They also object to certain travel expenses of an officer of R.C.A., Mr. Saxon, incurred by R.C.A. in connection with his deposition (Tr. 6979-6985). This expense was authorized under 28 U.S.C. § 1920(3) (1964). The United States Supreme Court in *Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 232 (1964), declined to adopt the position advanced here by appellants which would preclude a federal district court from ever taxing as costs expenses for transporting witnesses more than 100 miles.

91. That is, nine of the appellees. Norge Sales, dismissed previously on summary judgment, had allowable costs of only $20.

92. U.S.C. § 1920(2) reads in part:

"A judge or clerk of any court of the United States may tax as costs the following:

* * * * * * *

"(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case . . . ."

93. There were several defendants in that case, too. Numerous pretrial hearings were held over a period of nearly four years, and the trial extended over a period of approximately six weeks.

Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 224 (9th Cir.), *cert. denied,* 379 U.S. 880 (1964), this Court expressly allowed the costs of a second copy of a trial transcript for use of counsel.[94] See also *Bank of America v. Loew's Int'l Corp.,* 163 F. Supp. 924 (S.D. N.Y. 1958); *Perlman v. Feldmann,* 116 F. Supp. 102, 109 (D. Conn. 1953). Certainly under the circumstances of this case, procurement of two trial transcripts for the ten defendants was reasonably necessary—indeed essential—for the expeditious conduct of the trial.

(2) *Costs of Depositions.*—Appellants also challenge the allowance by the trial court of the cost of one copy of certain depositions taken by appellants and appellees. The trial court reviewed the expenses of each deposition listed by each of the appellees, one by one, and actually disallowed a considerable number of these expenses[95] (see, *e.g.,* Tr. 6944). The trial court adopted the correct standards in determining which deposition expenses to allow: (a) depositions used at trial as direct testimony or for potential impeachment of witnesses (see, *e.g.,* Tr. 6952-6955), or (b) depositions which had been taken of officers of parties in this case (Tr. 7005-7006). Only one copy of each such deposition was allowed (Tr. 6941; 7006).

In *Independent Iron Works, supra,* 322 F.25 at 678-679, this Court allowed, as a taxable cost, the expense of depositions taken by defendants which had been used in part for impeachment purposes. This was held a sufficient basis to justify the item as an allowable cost. In addition, all depositions taken of officers and employees of the opposing party were allowed, under the rationale of *Hancock v. Albee,* 11 F.R.D. 139 (D. Conn. 1951).[96]

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94. Appellants' counsel had unsuccessfully opposed the costs of additional trial transcripts in that case, too.

95. All of the disallowed depositions had been designated by appellants in their Pre-Trial Statement, intended for use at trial, but were never used (Tr. 6956).

96. The court there reasoned that the possibility that a deposition would be used to impeach the party created a reasonable necessity for ordering a copy of the transcript to hold the impeachment within proper limits.

The trial court allowed appellees the cost of but a single transcript of depositions. This cost should be allowed:

> "[W]hen a deposition is taken within the proper bounds of discovery as delineated by the Federal Rules, *at least one transcript thereof . . . will normally be found to be necessarily obtained for use in the case, whether or not the deposition is actually offered or used in the trial." Perlman v. Feldmann,* 116 F. Supp. 102, 110 (D. Conn. 1953).

The trial court acted correctly.[97]

(3) *Cost of Pre-Trial Transcripts.*—Another category of taxable costs that is a subject of this appeal consists of copies of transcripts of various pre-trial hearings. There was ample support for allowing such costs, particularly, as in the present cases, "where the pre-trial proceedings devoted considerable efforts to the limiting and clarifying of issues, were conducted at considerable length and where a proper understanding of the matters covered and preparation of a pre-trial order could not properly be had without a transcript thereof." *Bank of America v. Loew's Int'l Corp.,* 163 F. Supp. 924, 931-932 (S.D.N.Y. 1958). See also *Twentieth Century Fox Film Corp. v. Goldwyn,* 328 F.2d 190, 224 (9th Cir.), *cert. denied,* 379 U.S. 880 (1964); *Brookside Theatre Corp. v. Twentieth-Century Fox Film Corp.,* 11 F.R.D. 259, 266 (W.D. Mo. 1951), *aff'd,* 194 F.2d 846 (8th Cir.), *cert. denied,* 343 U.S. 942 (1952).

(4) *Reproduction of Exhibits.*—The final item of cost attacked by appellants consists of the expense of one copy of all of their exhibits. (See, *e.g.,* Tr. 6965-6971.) These costs were reasonably incurred in view of the documentary complexion of appellants' case. The documents were not otherwise readily available to appel-

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97. Perhaps recognizing the compelling precedent of the rule promulgated in *Perlman v. Feldmann,* appellants urge that depositions of representatives of alleged co-conspirators, not parties to the case, should have been excluded. This proposition is given no authority. Certainly, appellees could not have been expected to disregard testimony of representatives of alleged co-conspirators. Most of the alleged retail and distributor co-conspirators were not parties at the trial, yet appellants attempted to implicate all in the imagined boycott.

lees for use at trial. *Twentieth Century Fox Film Corp. v. Goldwyn, supra,* 328 F.2d at 224. The ruling was correct.

CONCLUSION

For the foregoing reasons, this Court is requested to affirm the judgment of the District Court in all respects as to appellees General Motors Corporation and Frigidaire Sales Corporation.

Dated: April 30, 1968, at San Francisco, California.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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